No. 94.

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JAMES H. McKENNEY,
Clerk.

Assignment of Errors.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Nov. 20, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GECRGIA MANUFACTURING COMPANY, AND WILLIAM T. HUGULEY, APPELLANTS,

vs.

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER.

ASSIGNMENT OF ERRORS BY THE APPELLANTS IN THIS CASE.

JOHN T. MORGAN,
Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1245

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ssignment of Errors by the Appellants in This Case.

The circuit court of appeals erred in entertaining an eal before any final decree had been rendered in this se in the circuit court.

ut its decree, affirming the interlocutory decrees of the uit court therein, brings the entire case before the Su- ne Court for determination on the appeal from said cir- court of appeals, which was allowed by Hon. Don dee, circuit judge.

2. On the face of the bill filed in said court and under the averments and statements therein, the circuit court of the northern district of Georgia had no right, power, or authority in law to render a decree granting the relief therein prayed.

Said bill contained no ground for relief in equity, and the circuit court erred in taking and retaining jurisdiction thereof and in failing to dismiss the same, of its own motion, for want of jurisdiction and for want of equity.

3. The circuit court erred in the form and substance of the decree rendered in this case on the 30th day of March, 1895, upon the facts and principles of law upon which said decree is founded, as follows:

a. The case was not at issue, the court not having made any decree *pro confesso* against William T. Huguley, a defendant therein, who had not entered an appearance. On the statements, averments, and prayer of the bill of complaint no valid decree *pro confesso* could have been rendered by the court against said Huguley, who had not filed any answer or plea in the case as a defendant therein; and the prayer of said bill and the facts stated in it, if taken for confessed, do not present a ground for relief which said court could grant.

b. Said decree was for a foreclosure as to some of the bonds secured by the deed of trust, the holders of which were represented by Robinson, the complainant in the suit, in his alleged right as trustee, for whom he had refused to receive the interest due on the bonds so held by him; and as to the holders of the remainder of said bonds whom Rob-

inson did not represent, and who had "accepted" payment of the interest on their bonds, the court refused to foreclose the deed of trust, thereby discriminating against them without cause in said decree.

c. That a like discrimination was made by said decree in the money judgment rendered therein in favor of the bondholders preferred therein, and in the right to pay the purchase price of the property ordered to be sold at the sale under said decree in the bonds of the Alabama and Georgia Manufacturing Company, which discriminations are contrary to law and are not justified by the pleadings or proofs in the case.

d. That in said decree a judgment for the amount of the mortgage debt left unpaid after the sale of the property, was rendered against W. T. Huguley, a trustee in the deed of trust, as one of the defendants in the suit, in favor of Robinson, the other trustee in the same deed, for which execution was required to issue.

e. And a like judgment was rendered against the Huguley Manufacturing Company, and execution was ordered to issue thereon, when the record nowhere shows that any sum was due to the complainant or the bondholders or to any other person from said Huguley or from said corporation, and no such sum is claimed in the bill or elsewhere in the record.

4. That said circuit court, without authority of law and contrary to the statutory and constitutional limits of its

jurisdiction and powers as a circuit court of the United States for the northern district of Georgia, decreed the sale of lands, situate in Alabama, it being stated in the bill filed in the case, and also in the said decree that said lands are so situated, and said court directed that such sale should be made by an officer of the court at public sale, to be had and conducted at a place in Harris county, in the State of Georgia, as to which decree and proceedings thereunder said circuit court had no power or jurisdiction in the premises.

5. That the record, proceedings, and proofs in this cause show that this suit and the proceedings under the same were instituted and conducted for the benefit of the holders of certain bonds, ninety in number, and of the value, on their face, of $45,000; that said bonds were controlled by L. Lanier, as their agent, and that the holders of the remainder of the bonds, forty in number, and of the face value of $20,000, were held and controlled by the holders thereof in their own right. This minority class of bondholders were not made parties to the suit, either as individuals or by bringing into the case any person of their class or any person whose interest or duty it was to represent them or to protect them. Every decree made in the case as between this minority class and the majority class of bondholders, who were represented by L. Lanier, was adverse to and injurious to the rights and interests of the minority bondholders.

The bill filed in this case made room for this situation by the uncertainty of its statements as to the ownership of the

bonds and their control by Robinson or other promoters of this litigation.

It was error upon the face of the record and upon the pleadings and evidence and in the decree of the court, all of which show the adverse interests of these minority bondholders, to proceed to any decree in said case until they were made parties defendant therein.

6. The evidence shows that this suit was brought by Robinson, trustee, without any necessity or excuse for legal intervention to protect the bondholders; that their investment was perfectly secure and had 13 years to run, at 8 per cent. interest, payable semi-annually, when it was attempted to be forced to maturity by this suit to gratify the cupidity of L. Lanier; that the powers of the trustees under the deed of trust were ample for the collection of interest on the coupons and for the security of the payment of the bonds at maturity, and that Robinson had no right or lawful excuse for attempting to force the principal debt to maturity by an alleged forfeiture 13 years in advance of its actual maturity, except that some of the bondholders *had requested him* to do so, and this he sets up in his bill as his excuse for the violation of his trust.

It was error to predicate a decree of foreclosure upon such allegations, and the proof does not establish any actual or legal default in the payment of interest on the bonds that, in a court of equity, would force the principal debt to maturity.

7. It was error to annul and forfeit the rights of the grantor in the trust deed and of William T. Huguley, the

cotrustee of Robinson, and to proceed, as if such rights had never existed, to seize the property and sell it. The evidence in the record shows that the interest on the debt had been fully paid up to January 1, 1891, as it fell due, or within the period of indulgence provided in the contract, set forth in the trust deed, and that the interest due on 40 of the 130 bonds was paid to the holders, who accepted the same, and was on deposit in a national bank in Atlanta, to pay the interest on the other 90 bonds before it fell due; that it was not the duty of the debtor to pay the interest on these bonds, except upon the presentation and demand of payment of the coupons. A delay in the mail that brought the remittance and the occurrence of a legal holiday prevented the tender of the money for one day, or possibly two days, and Lanier, to whom money was actually remitted to pay the interest that was due and payable on the 1st day of January, 1891, applied it, contrary to the directions of the debtor, to the interest coupons which, under the contract, were due on the 1st day of January, 1891, but were entitled to indulgence until the 1st of July, 1891. The proof shows that the complainant in this bill and L. Lanier, acting as agent of the majority of the bondholders, refused to accept the money for the payment of any interest on the bonds after the 1st of January, 1891, on the ground that the whole debt had become due, and on this state of facts, proven in the case, it was error to decree the foreclosure of the deed of trust, as was done in the decree of March 30, 1895.

8. Said L. Lanier was made a party to this suit on his petition to confirm a sale of the trust estate, made under

the decree of March 30, 1895, at which he was a purchaser for the bondholders, as he alleged. On his petition, afterwards filed in the cause, the property was freed of all incumbrances theretofore made a lien upon it by decree of the court, and his purchase was made subject to such liens. On the 15th of October, 1898, said liens were transferred to the alleged fund in court, which was the money for which the trust property was sold, less expense and the costs of the suit, and the property was conveyed, by order of the court, directly to said L. Lanier, and the liens upon it were charged to the bondholders.

a. It was error to make the change in the terms of the sale of the land after the decree of March 30, 1895, was affirmed in the circuit court of appeals, and after subsequent decrees set out in the record were also affirmed.

b. It was error to transfer the liens fixed upon the property by the previous decrees of the court, after the sale had been made subject to such liens, and fix them upon the fund in court upon which the bondholders had the prior and paramount lien.

9. L. Lanier was largely interested in, if not the exclusive owner of, the bonds that he professed to manage for others in this suit, and in virtue of such control he acquired the entire trust estate in his own name as owner, and the effect of those decrees and the expenses of this litigation reduced the value of the bonds of other holders at least 30 per cent., as the proof shows. It was error to render such orders and decrees in his behalf, which directly concerned all the bond-

holders, without giving them any notice thereof, and to proceed therein on his petitions and motions, as the same appear of record in the cause, without making the bondholders or any of them or any representative of the minority bondholders defendants in the same. The evidence shows that L. Lanier set out, in getting up this suit and in conducting it, to capture the property in the trust deed, having Kirby and Dallis as coadjutors, and he succeeded by inflicting gross wrong on the bondholders and the defendants in the original bill.

10. It was error to change the terms of the sale of the trust estate from a sale payable in bonds, which was made and confirmed in May, 1896, to a payment in cash in October, 1898, and to make the title relate back to the date of the sale in May, 1896. That purchase was expressly made on account of the bondholders, and it was converted more than two years later into a sale for cash for the sole benefit of L. Lanier. The decree conveyed the title by relation to Lanier as of the date of May 5, 1896, and thereby relieved him from liability to the bondholders for rents for nearly three years.

It was error to permit L. Lanier, who was admitted as a party to the suit as trustee or agent for the majority of the bondholders, to litigate for his personal benefit, at their expense and to their disadvantage and to the disadvantage of the other bondholders who were not represented in the suit, and also to borrow money from the West Point Manufacturing Company, of which he was president and principal owner, at 1 per cent. per month, to pay $16,000, of which

$10,000 was applied to his bid for the property at the sale under the decree of March 30, 1895; and it was error to permit the Galeton Cotton Mills, a dummy corporation in Alabama, created by Lanier for the purpose, to receive a deed from him for the property sold under said decree, and to account for the net proceeds, as a mortgagee in possession, for the period during which he was held to account for the use of the property. For nearly three years of the period of his possession he was permitted by the decrees of the court to hold the possession as owner without any accounting for the use of the property. And this was error.

The possession of the property sold by the decree of the court in 1892, that was afterwards reversed, was held by the Galeton Cotton Mills, an Alabama corporation which was created for that purpose. If the majority of bondholders were in any sense mortgagees, they were not in possession of the property after the sale by decree of the court, but this foreign corporation was in possession for the benefit of Lanier, and resisted an accounting, thereby loading the bondholders with heavy costs and extraordinary charges in that litigation.

11. Appellants assign for error, on this record, the same errors that were assigned in the circuit court of appeals and are printed in the transcript certified on this appeal, on pages 79 to 95, including folios 93 to 111, and part of folio 112, and they pray that the court will consider the same, without requiring the same to be again printed in a separate document.

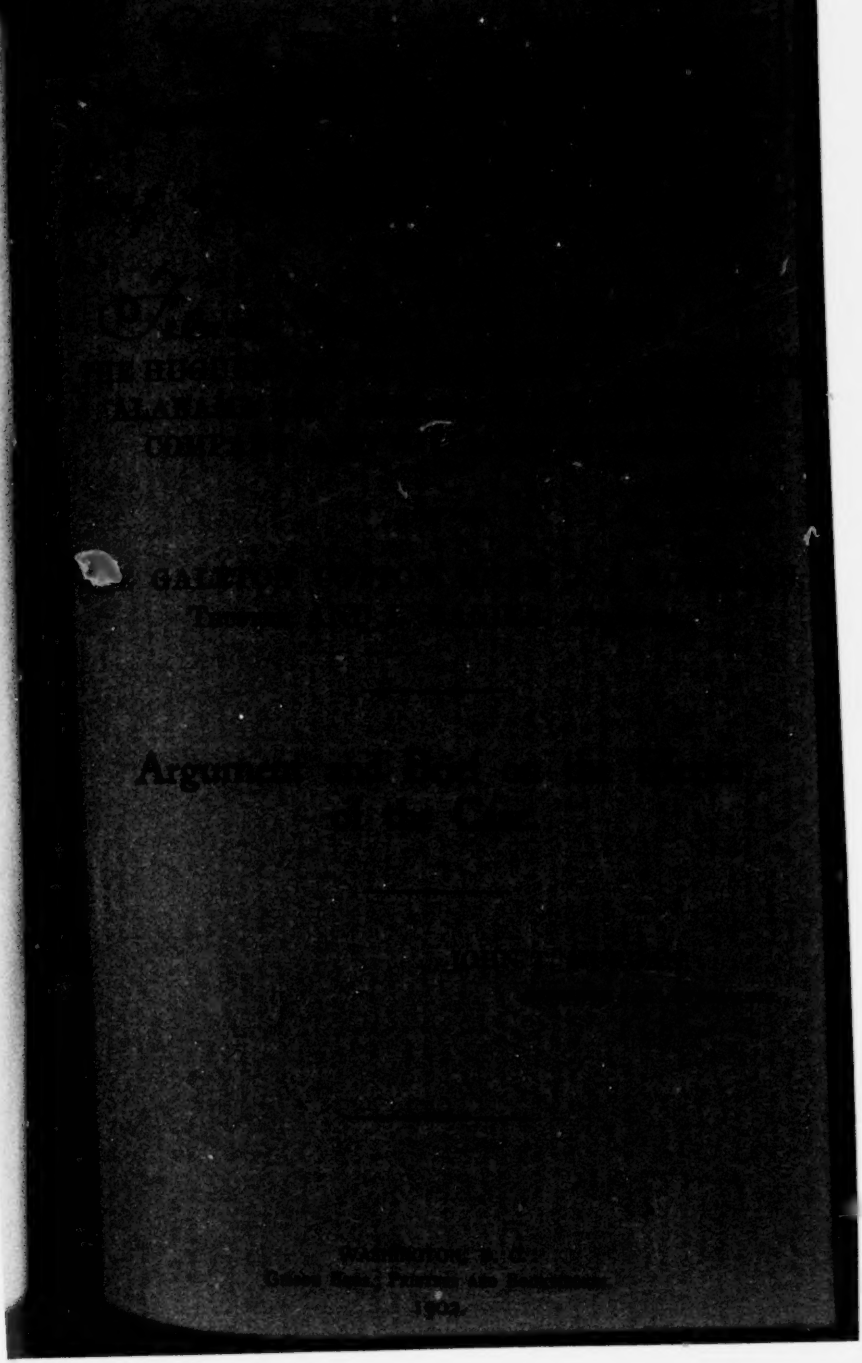
12. And appellants pray that this honorable court will cause the bill filed in this case to be dismissed, without

prejudice to any suit that shall be lawfully instituted by the holders of the bonds issued under the deed of trust which is the foundation of this suit, or in their behalf, by said trustees, or to any proceeding by said trustees or either of them to execute the powers under said trust deed according to the terms thereof.

And that, if this honorable court shall sustain the jurisdiction of the circuit court of the northern district of Georgia in this case, and the equity of this bill, that it will reverse and remand the case to the circuit court, because it is not at issue as to William T. Huguley, and that the court will require the plaintiff Robinson so to amend his bill as to show which of the bondholders he represented at the time this bill was filed, and their places of residence, and that the other bondholders, if they are residents of Georgia, be made parties to this suit.

13. And said William T. Huguley also separately assigns for error all the matters above stated as being erroneous and extrajudicial, and that all the decrees and proceedings had in this cause in the circuit court of the northern district of Georgia prior to the 12th day of November, 1898, and subsequent to the entry of default against him, are, as to him, erroneous, because said court was without jurisdiction to make said decrees against him.

JOHN T. MORGAN,
Attorney for Appellants.



Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, AND WILLIAM T. HUGULEY, *Appellants*,

versus

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER, *Appellees*.

ARGUMENT AND BRIEF ON THE MERITS OF THE CASE.

JOHN T. MORGAN,
Attorney for Appellants.

1. The question of the jurisdiction of the Supreme Court to entertain the appeal in this case has been so much discussed in the former briefs, on the motion to dismiss and on the motion for *certiorari*, which has been granted and return to it made, that a further discussion is deemed unnecessary, except upon a single point.

The denial of the *certiorari* applied for in this case at the October Term, 1890, of the Supreme Court for the review of the entire case, was probably on the ground that the petition was based upon certain "extracts" from the record in the Circuit Court of Appeals, as is expressly stated in said petition, and not upon the entire record of the case in that court, and the denial of the prayer of that petition was not a judgment of the Supreme Court that the judgment of the Circuit Court of Appeals was final and conclusive in the case.

If the denial of the prayer of the petition was considered by the Supreme Court as being final, as a bar to any relief in the cause, in any form, it is not probable that the court would have ordered a *certiorari* to bring up a complete record in the case on this appeal.

Indeed, full and adequate effect cannot be given to the jurisdiction of the Supreme Court, in the review of causes and proceedings in the inferior courts, as it is regulated in the new judiciary act of March 3, 1891, if its powers are fettered by the form of the writ or petition employed in bringing the case or the question before the court. It is difficult to conceive of a supreme revisory jurisdiction, not controlled by some constitutional enactment, that is barred, by denying relief in one form of proceeding when it has power, in another form, to do justice according to law.

Such denial of a hearing of the case on petition for *certiorari*, which is a discretionary writ, is not, necessarily, an affirmance of the judgment sought to be reversed, and no mandate of affirmance issues in consequence of such denial. An appeal duly allowed, according to the statute, brings the record into the Supreme Court, and the question is not whether the case shall be heard, but whether, being heard, it shall be dismissed, or reversed, or affirmed.

2. In every respect Huguley's relation to the property in this suit united his personal interests with his duties as trustee, and both were in perfect harmony on the statement of facts in the bill. The averment that "he is interested adversely to your orator as the trustee of said bondholders," is not the statement of any fact that gives a cause of action, and presents no definite issue of fact. His failure to keep down the interest on the debt would lose him the possession of the property and all profit he could earn, during the period of the loan, and would deprive the Huguley Manufacturing Company, in which he was interested, of all chance to earn from the working of the cotton mills the $69,000.00 in money, and a much larger sum in judgment, they paid for this right, and the prospect of ultimate ownership of the property. Having the duty resting on him, as trustee, of providing for the continuance of the investment, for the benefit of the bondholders, he could have done no act more in keeping with that duty than to purchase the possessory rights of the mortgagor at the sale under the decree in chancery of the Georgia court.

3. J. J. Robinson is described in the bill exhibited in this case as a trustee, under a deed of trust, a copy of which is attached to the bill and is made part of it. He does not seek the advice or assistance of the court in the execution of the trust in this suit, but he abandons the duties and obligations imposed upon him by his acceptance of the trust, and prays for a receiver to take possession of

the property and sell it, thirteen years in advance of the maturity of the debt secured by the deed.

If the alleged forfeiture of the contract date of the payment, or of the maturity of the debt had occurred before the bill was filed, it was also the contract right and the duty of the trustees to sell the trust property, or so much of it as would pay the debt, or such part of it as was due and unpaid, according to the terms of the agreement. He abandoned his rightful powers and duties and went into court to foreclose the deed of trust and sell the entire trust estate through officers to be appointed by the court. There was no legal right or necessity for such a proceeding. It was a proceeding in real hostility to the trust. If a receiver, for which he prayed had been appointed, that moment every legal and equitable claim or title to the property vested in Robinson by the deed would have enured to the receiver, and he would have lost all right to a decree in the cause of any sort in his favor as trustee, and all right to conduct the litigation or to dismiss his suit. It was only because he declined to press for the appointment of a receiver that he retained even the semblance of the right to ask for any decree in the cause.

He represented the bondholders and the grantor in the trust deed only in the capacity of a naked trustee and only in virtue of the powers conferred upon him in the trust deed. His relation to both was fiduciary and was limited to the terms and purposes of the trust, and he had no right to elect that either or any of the parties actually interested in the trust estate should go into court to have rights settled in contravention of the deed, or in accordance with it, so long as his powers as trustee remained and were not controverted, opposed or interrupted by anybody. He had no personal or official ground of complaint when he filed his bill, and was an intruder upon the rights of the bondholders he assumed to represent, and upon others.

4. The pretexts offered in the bill for causing unnecessary wasteful, vastly excessive and harassing litigation, and for placing this property under the hammer, that Lanier might buy it with the bonds he had gathered into a syndicate, formed in considerable part of women and children for whom he was acting, were, as stated in the bill, 1st, that Yancey, one of the three trustees, was dead; yet the deed gave the title and all the trust powers to the survivors in that case. 2d, that W. T. Huguley, the other trustee, "*is interested adversely to your orator as trustee of said bondholders.*"

The only facts stated in the bill to show such adverse interest

are, "that under and by virtue of a decree in chancery issuing out of the Superior Court of Troup county, Georgia, at term, 1888, all the property of said Alabama and Georgia Manufacturing Company covered by said deed of trust was sold by the sheriff of Harris County, Georgia, on the first Tuesday in January, 1890, and purchased by certain persons who afterwards, as orator is informed, conveyed or otherwise disposed of the same to the said Huguley Manufacturing Company, defendant herein. And said last mentioned corporation is now in the possession of the same, claiming said property *under said sale. Said sale was made subject in all respects to the rights and lien of your orator as trustee for the holders of said first mortgage bonds.* Said W. T. Huguley, defendant herein, and named as one of the trustees for said bondholders, *claimed at the time of said sale to be interested in the purchase of said property, and now claims to be interested in the property and assets of said Huguley Manufacturing Company.*" The trust deed on its face shows that it was executed by W. T. Huguley, as Vice-President and Secretary of the grantor in the deed, and Robinson, as trustee, accepted the deed which disclosed Huguley's interest. Whatever interest he acquired at the sale under the decree mentioned in the bill only added another trust, created by law, to the express trust in the deed.

It is not stated in the bill whether this judicial sale was made under liens that were older or younger than the deed of trust appended to the bill, but it is stated that "*said sale was made subject in all respects to the rights and lien of*" Robinson, "*as trustee for the holders of said first mortgage bonds.*"

This is all that relates to any conflict or antagonism of interests between Huguley's rights, so acquired, whatever they were, and any right of Robinson, as trustee, or of the bondholders, under the deed of trust. No act or statement of Huguley, beyond what is above stated, is referred to in the bill to sustain the allegation that "*he is interested adversely to your orator as the trustee of said bondholders.*"

And there is no such act or statement in the proof, or in any part of this entire record; but there is abundant proof in this record that Robinson, as the tool of Lanier, was used for the purpose of antagonizing the interests and rights of the bondholders, and of capturing this trust estate, which Robinson claimed the exclusive right to administer and control as trustee.

On the statements in the bill, and aside from the proofs which demonstrate Huguley's fidelity to the trust, Huguley did not place

himself in opposition to, or in any adverse relation towards, the bondholders, or his co-trustee, or the grantor in the deed of trust, by acquiring an interest in the mortgaged property, or a possession, or right of possession thereof, or the equity of redemption therein, if that was what was sold. A right of possession and usufruct were sold, subject, in all respects, to this deed of trust.

As trustee, Huguley had the right to buy the property at a sale made under another mortgage or lien of any sort, by judicial decree, subject to the mortgage in which he was trustee, and his purchase enured to the benefit of the mortgage estate by operation of law. Such purchase protected the lien and rights conveyed to the trustees under the deed appended to the bill, and preserved the property then subject to a debt, the maturity of which was postponed for more than thirteen years. It was a beneficent and loyal act, entirely consistent with the trust, and it united the possession of the trustee with the title to the property, when the legal title of the mortgagor had been foreclosed by the Georgia decree and had ceased; having been sold under the decree of a court of competent jurisdiction.

After that purchase, Huguley held the right of property and possession of the mortgagor, subject to the deed of trust, and never otherwise. The investment was safe, the property being of the value four times the amount of the debt, and having twenty years to run, with negotiable interest coupons payable each six months at eight per cent. per annum. The bondholders were greatly interested in the continuance, as well as the security for the loan, and the deed carefully provides for the operation of the mills as a continuing business. Huguley's interest in the property was to pay off the mortgage debt and interest as it accured, and, to this end, as well as to preserve the property in repair and to increase its value, he was doing exactly what the deed required of him as trustee, in the operation of the mills and in their preservation, had he and his co-trustees taken possession under the deed of trust, in case of default in the payment of the interest, or in case of a failure to keep the property insured, or in case of any damage to the property.

It is too severe a tax, even on the imagination, to ascertain how such a purchase could be in hostility to the trust or to any right or interest of Robinson as trustee, or to anybody interested in the deed of trust.

On this pivotal point the suit fails, for the non-joinder of Huguley as a complainant, the right of action and the right to decide whether a suit was necessary being equally his right with that of his co-trustee.

5. There was nothing in Huguley's attitude, at any time, that was adverse to Robinson as trustee; but if there was, that situation furnished no ground to support a bill for the sudden foreclosure and sale of the property, at the suit of Robinson, or under the great expense of a law suit. His remedy, if he had any reason for going into court, was to ask a proper court of equity, on a proper bill, to permit him to execute the power of sale in the deed of trust, one co-trustee being dead and the other refusing to sell the property, and to ask the court to direct him and aid him in accounting with the bondholders and other claimants, including his surviving co-trustee.

This bill has no such aspect, and no such decree could be predicated on its statements, averments, or prayer.

6. It is a bill for a foreclosure and sale under a deed of trust, exhibited by a trustee who is not a bondholder or creditor in his character as trustee, and upon an alleged forfeiture which, if it existed, authorized him, as trustee, to sell the property and pay the mortgage debt to the extent that it was due, without the intervention of any judicial tribunal, provided, always, that his co-trustee upon request made, or in some way had refused to join him in selling the property to pay the interest due on the debt.

It is the case of a plain, adequate and complete remedy by contract under the law, which was not controverted or opposed by anybody.

The facts stated in the bill show that the jurisdiction of a court of equity to grant the relief prayed is even more complete than if the remedy could only be by some action of the court, and the remedy at law was plain, adequate, and complete.

No intervention of any court was necessary in this case, and this is one of the great wrongs and hardships that have been imposed upon everybody connected with it except Lanier, and has caused a gross imposition on the Circuit Court of the United States, by the fabrication of a complaint, for which no just ground existed, in favor of Robinson, who was a citizen of Alabama, and against Huguley and others, citizens of Georgia, who are innocent of any wrongdoing, in order to give that court an apparent basis of jurisdiction.

7. If, however, a suit in equity could be sustained by Robinson, as trustee, on the facts stated in the bill, if properly pleaded and on a proper prayer, as to any or all of the defendants, or for any purpose of the bill, or for the enforcement of the trust in any form,

it is shown on the face of the bill and the exhibit thereto that neither Robinson nor any bondholder has done the things required by the trust deed and the bonds and coupons secured by it, that entitle him or any bondholder to maintain the suit. Nor has any defendant in the suit done or omitted to do anything so required, that made them liable to be sued, at the time the bill was filed, for the entire debt secured by the mortgage, or for any interest not due until after the bill was filed.

This transaction was intended to cover the full period of twenty years for the two leading objects of securing the extension of existing debts due from a manufacturing company, and, in part, a loan with which to repair and improve the property, and careful provision was made in the deed to keep the mills in successful operation.

The deed of trust which embodied the whole plan of this arrangement was made by a prosperous company that owned a splendid property but owed debts that were not pressing for payment—the creditors being the stockholders. The deed recites that the company owed some notes and that the creditors of the company—the principal ones being named—"have signified their willingness to accept in lieu of their present notes against the company first mortgage bonds of the company."

Bonds on a security worth three times the debt were issued to the amount of $65,000 under that agreement, to fall due on the first day of January, 1904, "with interest coupons attached, payable semi-annually on the first day of January and July of each year for $20.00 each"; the bonds being in the sum of $500.00 each, which was a rate of 8 per cent. per annum, compounded every six months, with the privilege to the debtor *to call in and pay the bonds and the coupons then due, after five years from the date of issue.* This was a simple refunding of an existing debt, and was advantageous to all concerned.

This privilege of calling in and paying the bonds and interest after five years from the date of the deed, is not dependent on the full and prompt payment of the interest due on the coupons during that period of five years. It is a right of redemption of the property at the end of five years, by the mortgagor, which is dependent on no condition whatever except the payment of the full amount of the debt and interest due when the right is asserted. It is of the same nature as the right of redemption secured to debtors whose property has been sold under execution in many of the States, which can be waived by agreement, but cannot be destroyed by the judgment of a court in advance of a sale of the property.

A decree of foreclosure of this deed, made March 30, 1895, on a bill filed January 20, 1891, which allowed thirty days in which to pay the debt, destroyed this contract.

If equitable grounds in fact existed for a foreclosure and sale, the title could not pass to the purchaser freed from this right of redemption.

That right was not forfeited, as between the parties interested in this deed of trust, by a default in paying the interest on the debt before the lapse of five years from the date of the deed.

8. The title to the factory property, consisting of lands and water power, by far the larger and most valuable part of which was in Alabama, was conveyed to three trustees, "in trust for the uses and purposes herein set forth." The deed was filed in the office of the Judge of Probate, of Chambers county, Alabama, on the 21st day of January, 1884, and recorded on the 24th day of January, 1884; the said J. J. Robinson, the trustee and complainant, being the judge of said Probate Court. Robinson had full notice of every fact in his case, when his bill was filed, and stated, literally, but not in connection with the true history of the transaction, only such facts as would make a *prima facie* case on the question of jurisdiction because of the diverse citizenship of the parties, and omitted any statement of the facts *required in the deed of trust* as to the basis of his right to claim that the non-payment of interest would force the entire principal debt to maturity.

No bond or coupon is copied in any part of the evidence, and the only proof of their terms is the recital of the deed of trust, and a statement of a part of the terms of the bonds, which corresponds with the recitals of the mortgage, as stated in the opinion of Judge Newman, delivered March 23, 1892.

Record, Part 1, p. 165.

9. In the bill it is stated that "orator has been notified since the expiration of the six months after the said July coupons fell due, by a majority of said bondholders, in amount, of *their election*, to treat the whole of said principal sum named in the bonds as due under the provisions of said bonds." The only other statements in the bill as to default in the payment of interest, at any time, is as follows: "The said Alabama and Georgia Manufacturing Company has failed to pay the interest on said bonds, *or a large majority of those falling due on July* 1, 1890, and has failed to pay any of the interest coupons falling due January 1, 1891, and more than six

months has elapsed *since the said July coupons fell due*, and they still remain unpaid."

This was on the 21st day of January, 1891, wanting more than five months until the January coupons would fall due.

And further, "no money was *on deposit* at the place of payment at the time said July coupons fell due, and none *deposited* within six months thereafter at the place of payment to pay the same, and all or *nearly all* of said July coupons remain unpaid, as orator is informed by the holders thereof."

It was impossible to pay these coupons and the costs, and stop this suit, as well because no amount is stated as for the reason that the names of the holders of the coupons are not stated.

With the exception of the following statement in the bill, *this is the entire case, as to any default in the payment of interest*, and as to the bonds or the holders or owners of the bonds, or the amount due on them, that furnished the basis of the "election to treat the whole principal sum named in the bonds as due under the provisions of said bonds," and also of Robinson's resolve "to begin proceedings to secure the property pledged for the payment of said indebtedness, and *he deems it to the best interest of the bondholders of said bonds that he should do so.*"

The innocence of his rights and duties, as trustee, under this deed, and of the right of an alleged majority in amount of the holders of the bonds, to elect that the principal sum of all the bonds should be considered as having fallen due, is only equalled by the ignorance of the fact that a minority of the trustees under this deed cannot determine the rights of the bondholders, who have waived the alleged default, and force them into a litigation, and the loss of a valuable investment, because Robinson "deems it to their best interest * * * that he should do so," and assumes to be their guardian *ad hoc.*

10. The deed provides that the three trustees, "or a *majority* of them," shall proceed to sell the mortgaged property at auction—*for "cash, or a sufficient amount of the same to pay the amount due.*"

"Should default be made in the payment of said bonds or of the interest on said bonds as it shall [(approve?) accrue, then, immediately on such default being made known by the holder or holders of said bonds or holder or holders of the coupons *attached* thereto, and if, *after notice is served upon the president of said company*, the same shall remain unpaid for six months after such default shall

have been made in the payment of the said interest or principal, as the case may be, and at the request of one or more of *the holders of such bonds* or coupons, and without any other authority from said Alabama and Georgia Manufacturing Company, upon giving sixty days' notice of the time and place of sale by publication," etc., the trustees shall proceed to sell, etc., as above stated.

11. It seems to require no argument to show that the power of the trustees under this deed to proceed to sell the trust estate, or of a court of equity to "foreclose" this deed, cannot be exercised, lawfully, or without violating the contract, without any notice having been given to the president of the company of default in the payment of interest coupons on the bonds issued under it, and that the holder of a single coupon cannot, by his mere election, put $65,000 of bonds, held by himself or another, into legal maturity, at a date fourteen years in advance of their maturity, according to the face of the contract.

This was, evidently, not the meaning of this contract, and to attribute to it such a meaning is simply to violate it.

12. The deed of trust provides that the bonds issued under it shall "bear eight per cent. per annum, with interest coupons attached, payable semi-annually; principal and interest payable at the office of the company in West Point, Georgia;" *but the default* that would empower the trustees to sell the trust estate, or justify a court in foreclosing the deed and selling the property for the principal of the entire mortgage debt, is defined in the contract, as it is set forth in the above-quoted extracts from the deed of trust. Such default is not the failure to pay the coupons when due, but *after demand at the place of payment and notice of non-payment served on the president of the company, and the delay or refusal of payment for six months after such notice.*

The illustration that is directly in point, and is conclusive to show the necessity of this check upon a bondholder or a coupon holder, or a combination of such, to wreck the company by forcing its property to sale and acquiring it by fraudulent artifice, is presented in the facts of this case.

This bill does not state that the president of this company was notified of any failure in the payment of any interest coupon, or that there was no president of the company on or after July 1, 1890, or January 1, 1891. It only states that no money was deposited *at the place of payment* at the time said July coupons fell due, and

none deposited within six months thereafter at the place of payment to pay the same.

Yet the record shows that Robinson was a stockholder and a director, and L. Lanier was both a stockholder and director in the Alabama and Georgia Manufacturing Company at the said dates of July 1, 1890, and January 1, 1891.

13. Robinson, as trustee and as director of the company that executed the deed of trust to him, was bound in conscience and in law to protect the trust estate, instead of yielding to Lanier's demand to put it under the hammer so that he (Lanier) might buy in the property, worth over $200,000.00, with bonds held by a syndicate of bondholders.

And Lanier, as a stockholder and director of the debtor company, could not lawfully or justly spring such an ambuscade on the company to which he owed obligations of duty.

14. It is alleged that the company "is insolvent, and has ceased to do business, and has ceased to keep an office in West Point or elsewhere for the transaction of business."

Yet the proof shows that it did have an office and it had a president and board of directors, of whom Lanier was one and Robinson another, and it had paid the interest on this mortgage, which held priority under the decree of a competent court over all other debts; and this trust estate was held by the Georgia Chancery Court, *in gremio legis*, in the hands of a receiver, after the sale to the Huguley Manufacturing Company, for the sole purpose of paying the interest on the debt. This receiver had never been discharged, nor had the order of that court ever been revoked. In the time of his receivership he paid the interest on this debt, both before and after the sale to the Huguley Manufacturing Company, as the coupons fell due, to all the bondholders, including L. Lanier, and through said Lanier's firm, as his agents, until said company took up the payment of said interest.

15. The Huguley Manufacturing Company, for the protection of their own possessory rights in the property, made provision for the payment of the interest on the bonds, which, by an alleged delay in the mails and the intervention of a legal holiday, did not reach the counter of the bank in Atlanta until one day after the first day of January, 1891, although the mail that contained the remittance reached the bank, or, according to the evidence, should have reached the bank before the first day of January, 1891. Within this brief space of

time, Lanier then thought he had found his opportunity to set up a forfeiture, or penalty, that would mature the entire debt, even as to those who received their interest and refused to join him in this unconscionable maraud.

Coming into a court of equity, in mask, behind the name of Robinson, trustee, he asks for a forfeiture and penalty that has cost innocent people a great sum of money, and has ruined some of them beyond remedy. If every legal technicality favored him a court of equity would still close its doors upon him for conscience sake.

The discussion of this pivotal point, on the merits of this case, so far as Lanier is concerned, was so truly and fully presented in this case, in the Circuit Court of Appeals, by Hon. Robert C. Brickell, former Chief-Justice of Alabama, that his argument and brief are now presented to the Court by the attorney for the appellants, as follows :

NITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT, AT NEW ORLEANS, LA.

No. 97.

HE ALABAMA AND GEORGIA MANUFACTURING COMPANY ET ALS.,

Appellants,

versus

J. J. ROBINSON, TRUSTEE, ET ALS.,

Appellees.

Argument for Appellants by Brickell, Semple & Gunter.

FACTS.

The Alabama and Georgia Manufacturing Company issued bonds the amount of $65,000. In the mortgage to secure the same it provided that the trustees shall be authorized, "should default be de in the payment of said bonds when they fall due, or in the yment of the interest on said bonds as it shall accrue, then im-diately on such default being made known by the holder or hold-s of said bonds, or holder or holders of the coupons attached ereto, and if after notice is served on the president of d company the same shall remain unpaid for six months er such default shall have been made in the payment of the d interest or principal, as the case may be, and at the request any one or more of the holders of said bonds or coupons * * upon giving sixty days' notice of the time and place of e * * * to proceed to sell at public auction * * * for sh the property herein conveyed * * * and apply the pro-eds of sale, first, to the expense of sale, second to the payment d liquidation of all the bonds and interest due on the same * * and the said Alabama and Georgia Manufacturing Com-ny hereby reserves to itself the quiet and peaceable possession of of said property herein contained * * * until after default herein provided." (Tr. 7–8.)

In each of the bonds there is this other provision :

"And it is hereby expressly agreed by the said company with each and any holder of this bond that in case of non-payment of any interest coupon hereto attached, if such default shall continue for six months after maturity and demand of payment, the principal of *this bond* shall become immediately due and collectible." (Tr. 2.)

The bonds are not yet due, but it is insisted that such a default is charged and proved in the case as to make them due, and the court decreed that they were due by forfeiture, and that the trustee "have and recover" the whole amount of the bonds, and that if the same was not paid in thirty days that the property be sold, and it was sold under this order and bought by the bondholders. (Tr. 159–160.)

This appeal is to reverse that decree and to have the sale vacated and to have the bill dismissed.

ARGUMENT.

The case of Chicago, etc., *v.* Fosdick, 106 U. S. 47, contains an express decision on almost every vital point in the case at bar, showing that the decree is incurably wrong and that the bill should be dismissed.

Parties have a right to make contracts as they please, so long as they are lawful, and courts cannot vary their terms and can only enforce legal remedies for defaults shown therein.

In this case the mortgage contains a provision under and by which the bonds not due on their face might become due by forfeiture. We have recited above that condition. It is a condition and a power combined—the default therein provided for must exist, and when that exists there is a power in "any one or more of the holders of said bonds or coupons" to request a foreclosure of the mortgage for the whole debt. (Tr. 7.)

The condition is that "default be made in the payment of said bonds * * * or in the payment of interest," * * * and that the interest or bond "shall remain unpaid for six months," "*after notice is served on the president of said company.*" The default must be made known "by the holder or holders" of the bonds or coupons, and notice must be "*served upon the president,*" and *six months must elapse after such service of notice.* (Tr. 7.)

The bill does not pretend that this condition was ever complied with, nor does it show that it could not have been complied with.

There was a president of the company upon whom service of notice could, at any time, have been had.

To any one familiar with the rules of law, or even of common business principles, it would seem superfluous to argue the point that no one should have any right to alter the terms *of the conditions* of a contract, settled between the parties, upon which one is subjected to a forfeiture and penalty; that is, to alter or dispense with the expressed conditions upon which a large debt, not due according to its terms, shall suddenly become due and payable and be enforced to the ruin of a debtor.

If such a power was lodged in any tribunal it would be the means of incalculable mischief, since it would be no less than allowing third parties to make contracts for other people.

There is no case which even hints at any such right or power being in or claimed by any court.

The right to foreclose by sale under a power, or by proceedings in court, must, of course, be perfect before it can be exercised, and if the right is clogged by a condition there is no such thing known in jurisprudence as dispensing with the condition. All this is amply shown in the case above referred to in 106 U. S. 47, *et seq.* See also Jones on Corp. Bonds, and M., Secs. 381–2–3–4–5.

In that case there was default in paying the interest on part of the bonds, and so there may have been (we will admit at present, for the sake of argument) here an omission to pay interest on part of the bonds. In that case there was a waiver of the particular default as to part of the bonds, and here there was a waiver, since part of the bondholders received in January, 1891, their interest due in July, 1890. There the court said the conditions to create a forfeiture against the debtor, by making bonds due from non-payment of interest after demand, etc., were necessary to be strictly complied with, and had not been complied with. And, consequently, it was held that the decree of the court *requiring the debtor to pay more than the amount of the debt actually due, as a condition to avoid the sale, was an incurable error in the decree, necessitating the vacation of the sale.*

So here there is no pretence even of compliance with the condition in the mortgage by which the whole debt might be collected, and it is evident that here, as there, some of the bondholders waived their rights, so far as they were individual, by taking the interest Yet the court here, as in the lower court in that case, required the payment of *the whole issue of the bonds as a condition of avoiding the sale.*

The court in that case say that such a decree is an illegal "exaction" from the debtor, and that the only correction possible is the vacation of the sale and restoration of the property to the debtor.

In opposition to this view it is said that the debtor was insolvent, and that the law does not require a vain and useless thing, and therefore does not require a demand to be made of an insolvent person. And the case of Shaw *v.* Bill, 95 U. S. 10, is cited in support of the proposition. The reply to this is, that the case cited is not one in which the demand was a part of a *condition* to create a forfeiture, but was on the point whether a demand was necessary to be made of an insolvent before the institution of suit to recover an amount actually due. In such a case a demand is dispensed with, and suit can be instituted at once for what is actually due. And here, there could be no objection to suit for the recovery of any amount actually due. But no case holds that a "default" to work a forfeiture—that is, to make debts due prior to maturity according to their face—and which is *conditioned* on a "demand" or notice "served upon the president" and the lapse of a given time thereafter, or on any other event, single or combined, can be worked out in any other way than through the actual happening or performance of every term of the condition. No one ever before heard that insolvency of the debtor dispensed with the terms of a condition.

On the contrary, it is expressly said in the Fosdick case, 106 U. S., pp. 73–6, that the insolvency of the company can have nothing to do with "the question of an actual default," and cannot affect the legal or equitable rights of the company. And a moment's consideration will show the danger of allowing any change in the terms of a contract as made by the parties. It was well known to the parties who were endeavoring to bring about a default in these bonds, that "the president," who was to be "served with notice," was the person interested in avoiding the technical default. His company had bought the property subject to these bonds, and it was worth four times the amount of the bonds, being insured for $200,000.

And these same parties knew that if he was "served with notice," the default would hardly be allowed to occur. To allow them, then, to dispense with this requisite, which must be supposed to have been inserted out of abundant caution, and to avoid what is now claimed, would simply be making a new contract and at the same time enforcing it without notice of the change to the party contracting.

So it can make no difference on the question of a default as provided for in the mortgage whether the company was solvent or insol-

vent. If a demand and the service of a notice on a particular person must be made, as conditions to the right to collect bonds before maturity according to their face, the conditions must in all cases be performed before there is any forfeiture.

To take away a person's property for and upon a forfeiture, which is conditioned on events which have never happened, and that, too, when the very contract, out of abundant caution, expressly reserves the right of the use and possession "until after default as herein provided," savors of confiscation. And it was practically so characterized in the Fosdick case, *supra*.

See also Farmers' L. & T. Co. *v.* Chicago, etc., 27 Fed. Rep. 152.

But the company was not insolvent in the sense in which the pleader intended the court to understand him. So far as the bondholders were concerned, the purchasers of the property subject to their bonds were practically the old company; they succeeded to the right to pay the interest on the bonds and avoid the forfeiture, and they were interested in doing so, and had been accustomed to pay it—they were able to do it—they had, with the knowledge of the bondholders instituting this suit, over $200,000 worth of property under a first mortgage to pay $65,000 of bonds and the current interest.

To refer to the insolvency, if it be a fact, of the old company as a reason why the demand of interest and notice of non-payment would be, under the circumstances, a "vain and useless thing," and, therefore, to be excused as part of a condition precedent to a right claimed is, to say the least of it, utterly preposterous. The truth is the property was well known to be worth at least four times the bonds, and the omission to make the demand and serve the notice was not to save the trouble of doing "a vain and useless thing," but to avoid giving the alarm to an intended victim.

It is next said that there is in each of the bonds the clause above set out, "that in case of the non-payment of any interest coupon hereto attached, if such default shall continue for six months after maturity and demand of payment, the principal of this bond shall become immediately due and collectible," and it is insisted that there is a right under this to foreclose for the whole debt.

It will be observed that this agreement is "by the said company with each and any holder of this bond." And if there was a default as therein provided it would be at most like the one allowed in the case of Fosdick, in 106 U. S., *supra*; one giving the holder or holders of a bond, as to which default was made, a right to insist

upon that bond being paid, and if not paid in a given time to require the property, or a sufficient part thereof, to be sold for that purpose, and if indivisible that it be sold as an entirety.

See also Farmers' L. & T. Co. *v.* Chicago, etc., 27 Fed. Rep. 152–3.

But in such case the other bonds, as to which no default existed, or as to which the default had been waived, by taking in this case the interest, and in the Fosdick case by accepting consolidated bonds on which interest was paid, could not be required to be paid to avoid the sale of the property, but only the bonds as to which there was an actual default.

But here, as in the lower court in the Fosdick case, the defendant was required to pay the whole bonded debt to avoid a sale, whereas there was confessedly no default, or a waiver of the default, as to a considerable number of the bonds.

If there was any default as to any bond, making it presently due and collectible, the decree, in the language of the Fosdick case, was incurably erroneous in "exacting" from the defendant the payment of all the bonds as the condition of avoiding a sale, instead of the bonds as to which the actual default appertained.

And if there was any default as to any of the bonds, as last above mentioned, it gave an individual right to the bondholder as the owner of the particular bond so defaulted, and no bill could be filed by him or by the trustee to assert the right to collect such bond, without distinctly claiming the right as applying to the particular bonds, which would have to be individualized or identified in the pleading. A moment's consideration shows that this must be so. The suit is in such case one to collect particular bonds, on account of a matter appertaining to such bonds, which of necessity must be described.

Chicago, etc., *v.* Fosdick, 106 U. S. 68, 77, 78.
Wood *v.* Consolidated E. Co., 36 Fed. Rep. 538.
Farmers' L. & T. Co. *v.* Chicago, etc., 27 Fed. Rep, 152–3.
Jones on Corp. Bonds and Mortgages, Secs. 51, 389.

In such suit the court would have to ascertain the actual default and give a reasonable time to pay it to avoid a sale, and could only sell all the property and pay all the bonds from the necessity arising from the indivisibility of the property. And not, as in this case, *require, in the first instance*, the payment of all the bonds to avoid a sale. Such an order is an "incurable error" and an "illegal exaction," as it is styled in 106 U. S., *supra*.

It will be observed that the bill in this case is not filed with any view to enforcing the collection of any particular bond or bonds as an individual right of a particular bondholder; and it cannot be converted into any such bill. It is filed to collect all the bonds, on a condition of forfeiture applicable to all, or giving the trustee a right to proceed to collect all. Such condition of forfeiture is only found in the mortgage, and it must be enforced, if at all, on the terms of that instrument. And we have seen that no forfeiture can be claimed under the mortgage.

Jones on Corp. Bonds and Mortgages, Secs. 381-2-3-4-5.

We also insist that if the bill had been filed for that purpose, there has been no forfeiture as to any particular bond, making it "immediately due and collectible." It will be observed that, to make a bond due before its time, there must be non-payment of interest, and such default must "continue for six months after maturity and *demand* of payment." (Tr. 2.)

In the Fosdick case, in 106 U. S. 77, it is said that such a "stipulation is in the nature of a forfeiture," and is to be construed in favor of the debtor.

And all the authorities hold that such forfeitures will not be enforced in case of fraud, accident or mistake, or when the conduct of the creditor "*indicates artfulness, trickery or stratagem in bringing on the technical conditions upon which the claim is made.*"

Union Mutual L. Ins. Co. *v.* U. M. P. Co., 37 Fed. Rep.289-90.
2 Jones on Mortgages, Secs. 1179 and 1185.
Noyes *v.* Clarke, 7 Paige, 179.
Wilson *v.* Bird, 28 N. J. Eq. 352.

Now, the rule is universal that the bill must allege a default "within the terms of the mortgage," or instrument sued on. Jones on Corp. Bonds and M., Secs. 381-2-3-4.

In the bill in this case no demand whatever is alleged. But the real party in the case, Lanier, attempts to prove a demand. Was there any "artfulness, trickery, stratagem or fraud" in this matter of the claimed default?

He says he made demand of W. S. Jackson, the last treasurer, and Harrington Bros., the last elected agents and managers. (Tr. 61.) He says he made this demand on the 1st of July, 1890. If coupons have days of grace, this demand was before maturity, and therefore no demand.

But did he artfully demand from a party having no interest? He swears, as do others, that Huguley & Co. had a sign in their office

at West Point stating that that was the office of the Alabama and Georgia Manufacturing Company.

The question was "Did not said W. H. Huguley & Co. have on their store, or on their curtains of the store, a sign or signs that the office of the Alabama and Georgia Manufacturing Co. was there?" (Tr. 57.) The answer is, "Yes, on one of the curtains." (Tr. 64.) It is admitted that W. H. Huguley was president. (Tr. 145.) The bill states that the Huguley Manufacturing Co. had possession as purchasers of the property, and that W. T. Huguley was adversely interested against Robinson as trustee. The mortgage expressly provides that notice should be served on the president, and the coupon, that it was payable at the office of the company.

Now, why did not Mr. Lanier go to the place advertised as the office of the Alabama and Georgia Manufacturing Company to make his demand? And why did he not make it of the president, who he knew had an interest in the property and in paying the coupons? (Tr. 81.)

Simply because he wanted, by trickery, to get up a technical default and to precipitate the whole debt on the owners, and possess himself and associates of this rival and valuable property of his enemy.

Every one would understand, and Lanier well understood, that the advertised office of the company was the place to demand the payment of the coupons, if any was to be made to enforce a forfeiture, and that the president was the man to make the demand of. But he avoids the place and the man, for no other purpose in the world than, by artfulness, trickery and fraud, to bring on a technical default. He did not want his money. He says he would not have accepted it on the 2d of January. (Tr. 64.)

A demand had to be made of some one competent to answer for the company, or the predicate for the condition of forfeiture as to the bond could not be laid. The coupon would, of course, mature without demand and could be collected—*but a "demand" had to be made or there would be no forfeiture.*

Lanier made his demand of persons having no interest, and who could not answer for the company, when he had notice of others who could answer, and were interested in making the payment. And he did this for the purpose, no one can doubt, to avoid publicity and to bring about a technical default.

Such trickery meets with no favor in courts of equity, and cannot be the foundation of a forfeiture.

There is evidence that the Atlanta National Bank was in the con-

spiracy with the Laniers. Its officers conveniently had no recollection of receiving the money sent from St. Louis on the 29th of December, 1890, until the 2d of January, when money sent by same mail went 80 or 100 miles further to West Point, and was received on the 31st of December. (Tr. 82, Ans. to 7th Int.)

The same bank, after receiving the money on the second, promised to wire Lanier at West Point to pay the coupons, but it conveniently sends a *night* message to make it a day later, and then makes a mistake as to the coupons to be paid.

Then its attorneys draw the bill and refuse to disclose who were the real parties instigating the suit. The interview between Orrick and Denson (Tr. 138) shows that the Atlanta National Bank was in the conspiracy notwithstanding it received its interest on the bonds in January, 1891.

Mr. Lanier then made no "demand" in the estimation of the law. His trickery and artfulness were resorted to for the purpose of avoiding the payment of the money he pretended to demand. There can be no default founded on such conduct. Authorities, *supra.*

There is thus no default, so as to make the bonds due before their time, either under the article of the mortgage or that in the bond.

There is another point to be looked at in the matter of the default as to the condition in the bond. The Atlanta National Bank had been advertised and accepted by the bondholders as the place of payment. (Tr. 132, 133.)

Lanier, it is true, swears he never collected any coupons there (Tr. 65), but others swear that he did. (Tr. 86.)

The payments alleged by Lanier to have been made in his office in West Point were made on the order of the Atlanta Bank. (Tr. 88). And the last dispatch to Lanier in January, 1891, was "to pay the coupons and charge the amount to the Atlanta National Bank." (Tr. 87.)

The money was in good faith placed with the Atlanta Bank to pay the interest. If Lanier intended not to accept that any longer as the place of payment, and to insist on the letter of the bond, it was his duty to give notice of his intention before insisting on a forfeiture.

Jones on Corp. Bonds and M., Sec. 383.

The question as to days of grace on coupons has been discussed in an argument made by others, but we will add this: That it is a question relating to general commercial law, as to which the courts of the United States are not dominated by local usages or laws. Nor is there any local law in the way, and the Georgia decision cited

is shown in the argument referred to to be only a dictum of the reporter.

The best author on the subject states that coupons are entitled to days of grace, and he gives a conclusive reason therefor. They are undoubtedly a part of the bonds, and after being detached commercial paper, so as to pass to *bona fide* purchasers free from equities, like bills of exchange. All such paper payable at a fixed time has days of grace, and it would be strange that the bonds should have this feature and the coupons not.

Jones on Corp. Bonds and M., Sec. 245.

If days of grace are allowed, this is an additional reason for holding Mr. Lanier's trickery to be unavailing.

BRICKELL, SEMPLE & GUNTER.

The foregoing elucidation of the fact that no forfeiture or penalty had been incurred by the failure to pay the interest on the bonds held by Lanier, into his hands, he having cunningly escaped an actual tender of the money, which he avoided with unjust, deceptive and fraudulent purpose, dispels the pretence that Robinson, or Lanier, in Robinson's name, had a leg to stand upon in a court of equity.

This absence of right or authority in Robinson, trustee, to represent any bondholders in this case, besides Lanier and those he controlled, is made clear in the decree of the court, dated March 30, 1895. The character and scope of that decree has been discussed in the briefs of appellants, on the motion for *certiorari* to perfect the record, and on the motion to dismiss the appeal to which reference is now made, in the argument on the merits, without repeating the same.

But it is fatal to this suit, that the Circuit Court found itself compelled, in order to retain the bill and grant any prayer it contained, to decree that Robinson, trustee, *did not represent the bondholders who had waived their right of action by "accepting" the payment of the interest coupons, held by them*, after January 1, 1891, and before the bill was filed in this case.

Robinson's scepter was thus divided and he was placed in the attitude of hostility to a large number of the bondholders he pretended to represent.

This attitude was due to the truth, as it was ascertained and reported by the special master in the cause, and confirmed by the court, but not as it was perverted in the bill.

Yet the bill was not amended so as to give the adverse bondholders a day in court to protect their interests against this superserviceable trustee, who still "deems it to their best interests," that he should be left to carry water on both shoulders and to force the belated bondholders into the service of Lanier.

The court, in order to retain its jurisdiction, under the facts stated in the bill, which were disproved by the report of the master, as to Robinson's right to represent the minority class of bondholders, decreed a foreclosure as to the Lanier faction, and refused it as to the others, thus leaving the deed half foreclosed and half in full vitality.

The personal decree for money, awarded to Robinson, with a writ of *fieri facias* for its collection, and against *all of the defendants*, was, in like manner, limited to the benefit of the Lanier faction for the sums found due to them, and was refused as to the others.

In the sale and purchase of the property the advantage, as to the amount of cash deposit, was given to the bondholders of the Lanier faction; whereby they were enabled to buy the property and pretend to pay for it with their bonds, and hold the others at arm's-length, for a lower price for their bonds.

The decree demonstrated both the want of equity in the bill, and the real purpose for which it was filed, namely, to enable Lanier to capture the trust property at less than one-third of its value.

There is no lawful reason why the decree should have divided this trust estate into two conflicting interests, and no other reason except that it was found necessary to do so to avoid the dismissal of the bill, the equity of which rested upon such loose averments as this. "The said Alabama and Georgia Manufacturing Company has failed to pay the interest on said bonds or a large majority of them, falling due July 1, 1890, and has failed to pay any of the interest coupons falling due January 1, 1891, and more than six months has elapsed since the said July coupons fell due, and they still remain unpaid."

The bill was filed on the 21st of January, 1891, when no default could have occurred on the coupons that fell due on the 1st of January, 1891, under the following stipulation in the bond, which is set forth in the bill. "In said bond, it is provided, among other things, as follows: 'And it is hereby expressly agreed by the said company

with each and any holder of this bond that in case of the non-payment of any interest coupon hereto attached, if such default shall continue for six months after maturity and demand of payment, the principal of this bond shall become immediately due and collectible.'"

The Judge of the Circuit Court, with the agreement in this bond before him, was compelled to hold that the coupons that fell due January 1, 1891, could not be in default, so as to force the whole bond debt to maturity when the bill was filed on the 21st of January, 1891. *So the court divided the remedy as to the different classes of bondholders giving the preference, in all respects, to the Lanier faction, who had really refused to accept payment of their coupons.*

It was this necessary array of conflicting interests of the bondholders, by classes, in order to have a class that Robinson, as trustee, in fact represented, for which purpose the suit was instituted that brought into the case the unexampled tergiversations that have attended every subsequent proceeding in the case.

The decree of March 30, 1895, was affirmed in the Circuit Court of Appeals and became the law of the case, but it was repeatedly departed from and, in effect, it was overruled by subsequent decrees, where its operation was found to be inconvenient to Lanier.

These irregularities are pointed out in the briefs of appellants on the several motions made in this cause, and reference thereto is respectfully asked.

Lanier found it impracticable to hold the members of his party to their service of his plan, and, on the 14th of September, 1894, the court, in its opinion, says: "It appears that after the purchase of the factory property by Lanier and others, as trustees for the bondholders, that certain bondholders were not willing to come into the scheme of reorganization which the bulk of the bondholders had assented to, *and it was necessary to pay them in cash*, the pro rata amount which their bonds would be entitled to, *from the proceeds realized at the sale*." This statement of the court antedates the decree of March 30, 1895, and discloses the reasons why Lanier was afterwards moving back and forth to have decrees set aside or modified, that were entered on his petition and, finally, after cutting down the sum for which the property sold in May, 1896, namely, $66,000.00 to $48,433.36, on the 15th of October, 1898, the terms of the sale were changed, after it had been confirmed, from a sale payable in *bonds* to a sale for *cash*, and from a purchase by Lanier and others, as trustees for the *bondholders*, to a purchase by Lanier for *his individual benefit*, and, in a decree of the 15th of October, 1898,

the court directed that, on the payment of the said sum of $48,-433.36, by said Lanier, that the title to the property should be conveyed to *him* or to such person as *he* should designate. The various successive steps that were taken in this case to reach that result, are stated in the above-mentioned briefs in this case, and attention is respectfully invited to their consideration without repeating them in this argument.

In that progress, Lanier and the Galeton Cotton Mills, which was a mere incorporated convenience to assist Lanier in his raid, held this valuable property since May, 1896, until October 15, 1898, two years and five months, *without the payment of any rents*, and during that period he had charged the bondholders interest at the rate of one per cent. per month, for the loan of $15,000 used by him in paying for the property, in the cash deposits required by the decrees, and in lawyers fees and other expenses in conducting this suit, which are simply enormous.

Thus Lanier succeeded, with the consent and assistance of Robinson, in capturing the property he set out in this suit to obtain, and the bondholders who would not enter into Lanier's plans, or who abandoned him, after they understood his purposes, lost about 35 per cent. of the sums due them on their bonds. For this service, Robinson was paid five hundred dollars, which came out of the bondholders, because it took that much from the fund arising from the sale of the bonds and other mill property, which was less than the bond debt.

BRIEF.

1. The subject-matter of this suit—the *res* being "real estate," "lands, including all tenements and improvements, including the cotton mill and all the machinery therein or thereto belonging, and all water privileges and riparian rights now owned" by the grantor in a deed of trust, and the greater part of the land conveyed by the deed being in Alabama, *the judicial power requisite to sell and dispose of said land and appurtenances and convey the title, through an officer of the court, as the same is invoked by this bill, is not a part of the judicial power conferred on the Circuit Court of the Northern District of Georgia, by the Constitution and laws of the United States*, and any decree on such a bill, except to dismiss it, *is extra judicial*.

The bill in this case and the decree rendered upon it cover the entire property included in the deed of trust, all of which is

real estate. The decree orders the sale of the entire property, in one body, by a commissioner of the court to be made, and it was made in the State of Georgia, in violation of the laws of Alabama governing judicial sales of real estate; and the title of real estate in Alabama was divested out of the mortgagor, and invested in the purchaser at said sale.

If an action of ejectment cannot be maintained in a court of Georgia for lands situate in Alabama, for a better reason a court in Georgia cannot foreclose a mortgage on lands situate in Alabama, and sell such lands to pay the mortgage debt. The court in Georgia, whether State or Federal, has no power or jurisdiction to render such decree.

A court sitting in one State, to which alone its judicial process can run, cannot foreclose a mortgage upon and decree a sale of land in another State. This is elementary law that is based upon the sovereign right of every State to exercise exclusive jurisdiction to control the judicial sale of lands situate within its boundaries.

Boyce *v.* Grundy, 9 Peters, 275.

This case is all fours with the case at bar.

Railroad *v.* Ramsay, 22 Wallace, 327.

Mansfield Railway Co. *v.* Swan, 111 U. S. 379-82.

Watkins *v.* Holman, 16 Peters, 26.

Morris *v.* Gilmer, 129 U. S. 325.

And the cases cited on points 10 *to* 19, *on pages* 78 *to* 83 *of appellant's brief in this case on the motion for certiorari at the present term of the Supreme Court.*

2. This bill is founded upon the alleged fact that the coupons attached to a majority, in amount, of the bonds issued under the deed of trust, which fell due on the 1st day of July, 1890, were due and unpaid on the 1st day of January, 1891, and at the date of the filing of the bill. The alleged debtor is a Georgia corporation, of which J. J. Robinson, who is a trustee (one of three) in said deed, was also a director of said company, and L. Lanier, who was the principal holder of the said unpaid coupons, was also a director in said company.

3. Unless some fact is stated in the bill which shows that Robinson, as trustee, had the exclusive right, as against W. T. Huguley, his only surviving co-trustee, to assume to conduct the entire management of the trust, and to execute it in all its provisions, he was

compelled to join Huguley in his bill to foreclose the mortgage on the trust estate for the benefit of the bondholders, if the trustees could have any right, on the facts stated in the bill, to go into court and ask for such a decree. Huguley is made a defendant, but no decree is asked against him, as trustee, and no failure or refusal to do his duty as trustee is stated in the bill.

No fact is stated in the bill, which shows that Robinson, as trustee, had any such exclusive right. He assumes the attitude of the sole creditor, as trustee, representing certain bondholders as *cestuis que trust*, whose names are not stated, and sues alone upon a demand or cause of action that belongs alike and equally to him and Wm. T. Huguley as trustee if it has any existence. This is also one form of fraud upon the jurisdiction of the court which is apparent on the face of the bill; Robinson being a citizen of Alabama, and W. T. Huguley being a citizen of Georgia.

Faurie *v.* Tesson, 1 Black, 309; Railroad *v.* Orr, 18 Wall, 471; Walden *v.* Bodley, 14 Pet. 156; Carey *v.* Brown, 92 U. S. 171; Seymour *v.* Freer, 8 Wall. 202; Greenleaf *v.* Queen, 1 Pet. 108. And see the cases cited in appellants' brief on the motion for *certiorari*, at this term, on pages 89 to 95.

4. Another fact, concealed by Robinson but disclosed in the answers of the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, the only other defendants in the case, is that Robinson, at the time of the filing of the bill, and at the time of the alleged default in the payment of the coupons as stated in the bill, was one of the directors of the debtor—the Alabama and Georgia Manufacturing Company.

5. His suit against said company was, in legal effect, a suit against himself as a legal representative of the company, and was not within the jurisdiction of the Court so far as that jurisdiction is dependent upon the diverse citizenship of the parties plaintiff and the parties defendant in the suit.

The corporation being a citizen of Georgia, the directors are citizens of Georgia as to all suits brought against the corporation by the directors, and in this case, the suit being for the non-performance of a contract of the corporation to pay money at a certain time to third persons, the non-payment of which worked a forfeiture of the whole property of the corporation, Robinson as a director, was as much responsible for the default as any other director. The forfeiture he claims in his bill is based on his own default, for it distinctly appears in the proof that the assets of the corporation

were, at that time, amply sufficient to pay the interest on the bonds as it accrued.

Thus taking advantage of his own laches, which created the default, if any existed, he resorts to a federal court in his capacity of a citizen of Alabama, to sue himself as a director of a corporation in Georgia, concealing the fact, in his bill, that he is such director. This is a fraud on the jurisdiction of the court, by the concealment of a fact that he knew and was bound to disclose. If the jurisdiction of the Court did not depend upon diverse citizenship of the parties to the suit, here was a fraudulent concealment of a fact, materially affecting his right of action, for which a court of equity would dismiss his complaint.

6. The stockholders of the corporation have the clear right to hold Robinson amenable for his failure, as director, to have the assets of the company in the hands of H. C. Fisher, the receiver of the property under the decree of the Georgia Chancery Court, applied to the interest of this first mortgage debt as it fell due, and for the breach of trust under the deed, in not selling so much of the property conveyed to him for that purpose as was necessary to prevent the forfeiture on account of the non-payment of interest, which he is endeavoring to have declared and decreed in this bill.

7. He has permitted Lanier and his followers and coadjutors, to elect that the entire debt of $65,000.00 is due thirteen years in advance of the period of maturity stated in the bonds and in the deed of trust, and brought his suit to have a decree passed to confirm such election, when his duty as a director of the debtor corporation, and also as its trustee was palpably violated or clearly neglected.

8. Such a bill cannot contain equity, and such a fraud upon the jurisdiction of a federal court cannot entitle Robinson to a decree in this case.

Besides, the purpose of the suit was to obtain a technical advantage from the failure of the corporation, in which Robinson was a director, to pay a part of the interest on the debt for not more than one day after it fell due, and to force the maturity of the entire principal of the debt of $65,000. This was unconscionable. And a purpose, no less clear, is shown by the proceedings and proof in the case to use the power of the court for speculative purposes, at first for the benefit of Lanier and some of the bondholders at the expense of the defendants in the case and the other bondholders. The

ruling of the court in Randolph *v.* Quicksilver Co., 135 U. S., on page 460, is in point. That case is not nearly so strong as this in its appeal to the conscience of a court of equity to refuse its aid to an unjust, unscrupulous, and artful attempt to abuse justice.

9. Lanier, who drove Robinson into this suit for purposes that were only mercenary and not for the collection of a few coupons, the payment of which he refused to accept when offered before he filed his bill, was also a director of the Alabama and Georgia Manufacturing Company. It was his duty to save the whole debt of the company to the bondholders from being forced to premature payment, and the whole of the company's property from being swept away under a forced sale, thirteen years before the principal debt was due. As a bondholder, he held ample security for his investment at a high rate of interest, payable semi-annually.

His duty as a director of the Alabama and Georgia Manufacturing Company, and his legitimate interest as bondholder, united to induce him to prevent any forfeiture or confiscation of the property for the non-payment of the interest due on the bonds he held for himself and as the agent of others. But these things did not satisfy his greed, and thinking he could wreck the company by getting control of some of the bonds, and could force other bondholders to join him, or to sell their bonds to him at a heavy loss, he arranged to force a forfeiture and virtual confiscation of the property, and used Robinson as his tool.

10. At the outset Lanier avoided the court and its power to deal personally with him, and he put Robinson forward as his representative. He also avoided the State court, which held the property in the grasp of its receiver after it had been sold to the Huguley Manufacturing Company, and before that sale, for the express purpose of paying the interest on the bonds secured by the deed of trust as the paramount lien on the property, which that court declared to be a first lien, and carefully provided for its maintenance until the principal debt should fall due. And like many who suppose that the Federal courts have some supreme power to overrule or disregard the decrees of State courts, he fairly pushed Robinson, as trustee, into the Circuit Court of the Northern District of Georgia, with this clandestine and ruinous bill to masquerade as the fiduciary representative of this alleged benevolence to the bondholders.

11. But Lanier did not long remain in concealment as to his speculation. He bought the entire property at the sale under the

first decree in September, 1892, which decree was afterwards reversed and bid for at $66,000.00, payable in bonds, except $10,000 payable in cash. His purchase was made *as trustee for the bondholders*—all of them. At the next sale, in May, 1896, under the decree of March 30, 1895, he again bought the property as trustee for the bondholders at the same sum, $66,000.00, payable in bonds, except $5,000 payable in cash. Lanier became a party to the record in this case, as a petitioner for the confirmation of the purchase made by him in September, 1892, and as defendant in a petition for restitution to the possession of the property, filed by the Huguley Manufacturing Company in July, 1893, and in other petitions and motions presented by him in this case, so that he is *sub judice*, and his conduct from the beginning of the litigation is open to inquiry and the decree of the court.

12. It is perfectly established by the proofs in the case that Lanier's conduct, while he was a director of the debtor company, and while he was an agent of the National Bank of Atlanta, the depositary of the funds of the Huguley Manufacturing Company, furnished the sole pretext for the filing of this bill; that it was prepared by his direction by counsel employed by him, not for the collection of a debt due him or others represented by him, but for the purpose of creating a forfeiture under which a forced sale of the property would be had at which he would become the purchaser and final owner of this great cotton factory.

13. He has accomplished all of this, if the decrees in this case stand, and with it the ruin of other parties in interest. When it is material to equity and justice to know the motive and purpose of this suit, it can be ascertained only by the part Lanier has taken in it and not by the conduct of Robinson, who was his mere dummy. Two directors of a corporation acting in combination to wreck its property and to destroy thirty-five per cent. of the value of its bonds in the hands of innocent holders upon the pretext of a forfeiture contrived by one of them and supported by the other, and to have the title to all of its property secured to Lanier, one of the directors of the company, on the bill filed by the other as trustee for the bondholders is the true spectacle presented to a court of equity upon the facts of this case.

There can be but one just answer to the demand made in this suit for the confirmation of such transactions, and that is the dismissal of the bill without prejudice to the rights of the bondholders.

14. Some of the bondholders have, in their depositions, denounced Lanier's conduct and motives in this case, and would have defeated his scheme but for the fact that they were not made parties to the suit, but were held bound to the course that Robinson chose to pursue as their lawful trustee under the deed. The statement of Lanier made under oath to the court that he was the trustee of the bondholders to purchase the property for them, is impeached, first, by the testimony of several bondholders, and, finally, by the decree of the court, on the 15th of October, 1898, that Lanier had purchased the property for *himself*. Between these two trustees, Robinson and Lanier, both self-constituted, the one to force the sale of the property and the other to buy it, a disastrous wreck was accomplished, from which Lanier escaped with a title to the property and ten years of rents and profits, and Robinson with $500 for his services, and his lawyers and agents with many thousands of dollars for their fees. The bondholders lost 35 per cent. of their value, and the Huguley Manufacturing Company lost everything—property and ten years of rents and profits, amounting to several hundred thousand dollars, which were diverted and confiscated by the West Point Manufacturing Company.

15. Looking at the bill and the results it has led to, as to the crushing of a manufacturing enterprise that was in successful progress, and as to the loss of 35 per cent. of the face value of the bonds that were amply secured to the holders, and had back of them the decree of a competent court of Georgia to compel the payment of interest on their bonds, and to compel the preservation of the property, and the care of the Huguley Manufacturing Company, who held possession of the property under that decree and in subordination to it, for which possession they had recently paid a sum not less than $120,000 in cash and in debts due them under that decree, it is difficult to realize that all this disaster could have been worked through a proceeding in a court of equity.

16. The surprise at these results is only increased by the fact that Robinson, in his bill, states so much of the proceedings in the Chancery Court of Troup county, Georgia, as shows that said court had fixed this deed of trust upon the property as a continuing lien, and that "said sale was made subject, in all respects, to the rights and lien of *your orator as trustee for the holders of said first mortgage bonds.*"

But he omitted to state that said Chancery Court had continued the receiver in his office under an express order to provide for and

pay the interest on these bonds, and held that power and jurisdiction over the property when the bill in this case was filed.

17. On the 22d day of May, 1889, the Chancery Court of Troup county, Georgia, made a decree in the case mentioned in Robinson's bill, filed in this case, and the court having, before that time, appointed H. C. Fisher as receiver in that case, the decree of the court rendered on the 15th of November, 1889, ordered the sale of the property by the Receiver on the first Tuesday in January, 1890, and it was then sold and was purchased for the Huguley Manufacturing Company, as stated in the bill in the case.

The order made on the 22d of May, 1889, in said cause, was as follows: "Said Fisher, receiver, shall promptly pay the past due interest, and the interest to accrue, when due, on the first mortgage bonds of said corporation out of any funds he may have while he remains in office." And the evidence shows that the receiver had ample funds on hand with which to pay said interest on July 1, 1890, and January 1, 1891. (See deposition of W. T. Huguley of May 30, 1894.)

After said sale said receiver continued to pay the interest on these bonds, through L. Lanier, as his agent, and he never resigned or has been discharged from his office of receiver.

The answers of the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company in this case, state the nature of the proceedings in the Chancery Court of Troup county, Georgia, and show the connection of L. Lanier, A. T. Dallis and J. J. Robinson with the case and that they were all parties in interest and were bound by all the orders and decrees made in the cause.

18. At any time Fisher, as receiver, could have resorted to any property of the Alabama and Georgia Manufacturing Company, to pay the interest on these bonds, including the property which had been sold subject to these liens, and he had the decree of the court authorizing him to do so. But Robinson, trustee, resorted to a Federal court to obtain authority to override the continuing power of the State court, through its receiver, and to force another sale of the property, at which Lanier was to be the purchaser and beneficiary.

19. The Georgia court had made the most careful provision for the protection of the first mortgage securities, while selling the residuary interest of the Alabama and Georgia Manufacturing Company in the property, for the payment of its other debts then due.

The first mortgage debt, as this debt was styled in the decree, had then about fifteen years to run and the bondholders did not wish their investment to be disturbed. The company was embarrassed with other debts, all of which were satisfied out of the proceeds of the sale of the residuary interests to the Huguley Manufacturing Company, whatever that interest may be, and that company at once began to repair and improve the property.

They were sedulous and careful to pay the interest on the mortgage debt, without which they would lose what they paid for the property. This was a just and wise arrangement for all concerned and, if it had not been disturbed by Lanier, it would have certainly paid the interest on the first mortgage bonds and the principal, when due, in 1904, and would have left to the Huguley Manufacturing Company a good profit on its investment.

This did not suit Lanier, who wanted the property, and he waited until he could find, or invent, a pretext for forcing another sale of the corpus of the property, for the alleged benefit of the bondholders, and rushed into a court of the United States to get it.

As a *stockholder*, *bondholder*, and *director* of the Alabama and Georgia Manufacturing Company, and an active promoter of the suit in the Georgia chancery court, he got the full benefit of the decree in that case, which satisfied all the debts of the company that were due, and retained the corpus of the estate, under the control of the court, to pay the bonds that he and others held. He waited until the Huguley Manufacturing Company had freed the property from all debts and liens, except the first mortgage lien, in which he was interested as a bondholder, and then proceeded to deprive them of the whole value of the possessory and other rights they purchased under the decree of the State court, by contriving an apparent default, not a real default, or, if technically a real default, one that was only accidental and was not by neglect or intended.

If he could obtain the property in this way it would be free of debt, and he and those who stood at his back would make a great profit while destroying a rival in business.

These facts, in substance, are set up in the answers of the defendants in bar of further proceedings in this case. They are proven conclusively in the evidence, and the court, upon consideration of them, should have dismissed the bill.

20. When the circuit court took further action upon the bill after the reversal of its first decree, having ousted the Huguley Manufac-

turing Company and decreed the possession of the Galeton Cotton Mills, only another name for Lanier and his associates, the Huguley Manufacturing Company filed a petition in the cause asking for restitution to the possession of the property and an accounting for rents and profits against said Galeton Cotton Mills and Lanier and his associates, who owned the stock and comprised the said company.

The Galeton Cotton Mills was incorporated in Alabama to hold the title to the property bought by Lanier as trustee for the bondholders, which he conveyed to said company. This sale to Lanier was confirmed by the court, and he created this corporation to hold the title beyond the reach of the court in case of the reversal of the decree of the court, and to shelter him and his associates—the West Point Manufacturing Company—against personal liability for rents and profits.

21. The petition for restitution was denied, except upon conditions that the Huguley Manufacturing Company could not comply with, and the Galeton Cotton Mills, a new-born corporation created for this sole purpose, was left in possession of the property until October 15, 1898, when, by decree of the court, the pretended title of that company, and all trusts in favor of the bondholders were swept out of Lanier's way, and the title of the property was decreed to *him* as an *individual*, and he was exempted from accounting for rents and profits after the second sale of the property in May, 1896.

22. On this feature of the case, there was much litigation, and the assignment of errors points out the rulings of the court to which exception was taken and are now here insisted upon.

23. The court ordered an accounting between the Galeton Cotton Mills and the Huguley Manufacturing Company, to cover the period from the first sale of the property in 1892 to the second sale in May, 1896, about three years and nine months. On this accounting the heaviest part of the costs and legal expenses accrued, and it was very great. In the outcome, the rentals charged against the Galeton Cotton Mills were applied to the bonded debt. Lanier claimed this fund as the right of the Galeton Cotton Mills, and the Huguley Manufacturing Company claimed it as a right that followed their purchase of the property. The questions that arose on that branch of the litigation are now and here presented in the assignment of errors.

24. There can be no good or just reason in law or conscience why the bondholders in this case, who have not consented to this litigation, whose rights have been represented by Robinson or Lanier, against their protests, and who have not had a day in court to protect their rights and interests as parties to this suit, in some form, should be compelled to accept 65 per cent. of the face of their bonds at the end of ten years' litigation, in which they have not participated and have not encouraged, while Lanier, the actual promovant of the litigation, comes out of it as the owner of this splendid property, and his West Point Manufacturing Company (through the "dummy" corporation) pockets the rents and profits for the ten years. And if the Supreme Court sustains the jurisdiction of the Circuit Court and the equity of the bill for any purpose of relief justified by the facts stated in it, it is respectfully insisted that it should set aside the decrees for the sale of the property and decree an account for the rents and profits against the parties that have enjoyed them.

25. It is manifest and, indeed, it has been established by the accounting for the rents and profits of this property, from September, 1892, to May, 1896, in this case, that the net profit has been more than sufficient in each year, from 1892 to 1898, to pay the interest on the debt as it accrued, and quite sufficient to have paid the principal debt when it is due. And this would have been the result if Robinson had applied for a receiver, according to the prayer of his bill.

The evidence shows conclusively that the receiver, if appointed would, by this time, have earned money enough, above all proper expenses, to have paid this entire debt.

26. Robinson saw this necessary result and shrunk from it by declining to move for a receiver, because if a receiver should be appointed he would succeed to the legal title of the trust property as the legal custodian, and would represent the interests on which Robinson's right to come into court rested, and his case would fail for want of diverse citizenship between the real parties in interest in the suit.

Lanier saw this, and did not want a receiver to hold and operate the property, but wanted Robinson, his facile servant, to demand the sale of it, so that he could organize a syndicate, a conspiracy of bondholders, in fact, who as "a majority in amount," could control the purchase with their bonds, and he could control them.

27. If there is any feature of this case that is sustained on equitable grounds, it is the demand for a receiver; yet that demand is not supported by any necessity stated in the bill.

And it is a sad misfortune that a receiver was not appointed to keep the possession and control of the property out of the hands of Lanier and his Alabama corporation—the Galeton Cotton Mills—which was created for no other purpose than to receive and shelter Lanier's booty in this litigation.

28. But the Circuit Court, in its decree of October 15, 1898, set aside, in legal effect, all the decrees of sale made in this case, in 1892, and on the 30th of March, 1895, and in May, 1896, and the sales under them, which were made to Lanier and two associates, which were confirmed and conveyances made to said purchasers, as trustees for the bondholders, which purchases were payable in bonds, and were reported as having been paid for in bonds; and the bonds were surrendered in payment, unless the court was defrauded by the false affidavits of the purchasers.

29. Not only were the former decrees set aside by the decree of October 15, 1898, but the sales made under them were sustained *and the terms were changed* after the sale from *bonds* to *cash*, and the amount of the purchase price was reduced, and the purchase made and reported and confirmed as a sale to Lanier and two associates, as trustees for the *bondholders*, was changed to a sale to Lanier for his *personal benefit*, and the title was ordered to be made to *him*, or to such person as *he* might designate.

30. But if this extraordinary metamorphosis in the decrees of the court, which, by relation back to the date of the sale, changed the terms of the sale and the character in which the property was purchased, did not, in fact, exist, and if the decrees had been regular and lawful, yet the conduct of Lanier, in his manipulation of the power and credit of the bondholders, in making those purchases, should be held to set aside and annul his purchase of the property, and it should be held as being liable to the trusts expressed in the deed of trust, or that Lanier and his associates in this scheme of wrongdoing should be held to account for the rents and profits, and for all wastage of the property as a trustee *ex maleficio*.

31. The assignments of error point out the improper rulings that protect Lanier in this unconscionable course of conduct, the chief of which is, that by said rulings and decrees Lanier's title to

the property, in his own right, relates back to the order of sale, and to his purchase as a trustee for all the bondholders, and changes that decree, after two years and five months had elapsed, to a decree for cash, so that he would, during that period, escape all liability for rents and profits to the bondholders or to anybody. Lanier purchased this property as trustee for *all* the bondholders, and so stated under oath in his petition for the confirmation of the sale. This made him liable to the bondholders for the rents and profits of the property, so long as it remained in his possession, but the change made in the order of sale, and in the terms and conditions of the purchase by the decree of the 15th of October, 1898, relieved him of that liability and discharged the property from a trust fixed upon it in May, 1896, both by the order of the court and the admissions of Lanier made of record and under oath.

32. Under the terms of the purchase of the property made by Lanier in May, 1896, he became a trustee of the title, possession, income and profits thereof, to the bondholders. These rents and profits came into his hands while in possession under that purchase; and the title which he afterwards procured by a change in the character in which he made the purchase is still held by him in trust for the bondholders, and any increase in the value of the property enures to the bondholders, as to whom he has changed his relations by his wrongful act, from that of an express trustee to that of a trustee *ex maleficio*, and he and the property are liable to them accordingly until their debt and interest are fully paid, and any residue after such payment belongs in equity to the Huguley Manufacturing Company, or to the Alabama and Georgia Manufacturing Company.

33. The assumption of Robinson in filing this bill, in his character and upon his supposed right as trustee, is false in law, and the proof in the case shows that it was false in fact. Instead of protecting the bondholders in the progress of the cause he stood by and witnessed Lanier's false dealing with them, not only without protest, but he received $500.00 from the fund that belonged to them for his services in bringing the suit.

In the bill it was disclosed that Robinson did not, in fact, represent all the bondholders but only a majority in interest, and no bondholders were named in the bill.

As the case progressed and when the fact appeared that Lanier intended to capture the property for his own advantage, and his

conduct became distinctly hostile to the other bondholders, it w manifest that Robinson's trusteeship was the only means of keepi the minority bondholders in a state of enforced silence, while was used by Lanier to despoil them.

At the beginning of such a suit, upon a contract containing pr visions as to future rights and interests that a trustee in the de has no right or power to control, the bondholders (or a bondholde representing that class) are indispensable parties to the suit, defendants or as complainants, if their citizenship entitles them sue in a Federal court.

And in the progress of such a suit, when it appears that innoce bondholders are threatened with injustice by a bondholder who made a party, and is using that character to do them injustice, it b comes the duty of the court to require that they be made parti defendant, or else dismiss the bill.

34. The following extracts from depositions in this case show part the conduct of the case by Lanier and how far he or Robins had the right to represent all the bondholders whose interests a directly and most seriously affected by it.

EXTRACTS FROM THE TESTIMONY OF L. LANIER,

2d Printed Record, pp. 83–84.

Cross-Examination by Judge Chilton, of Counsel for t Huguley Manufacturing Company, Movants and Inte veners.

Q. Were you present at Hamilton, Georgia, when a sale same property, under prior decree in the case of W. H. Huguley Co., against Alabama & Georgia Company was had?

A. Yes, sir.

Q. How long was that before this last sale?

A. I think that sale was in January, 1890—the sale under t Huguley decree.

Q. What did the property sell for there?

A. I don't know. About $68,000.00, I think.

Q. That sale was subject to the first mortgage bonds, was it no

A. Yes, sir.

Q. Subject to these same bonds that were foreclosed under t latter suit?

A. Yes, sir.

Q. And it brought about $68,000.00 over and above the fi

mortgage bonds; the buyer at that sale bid under the decree in his favor; but I will ask you whether or not there was another bid of nearly the amount that was actually bid for it?

A. Yes, sir; I think the property started considerably below that and bid up to that point.

Q. Wern't you interested in the bidding at that sale?

A. I was very near a man who was bidding on it.

Q. Didn't you have a business interest in connection with it?

A. Nothing of a serious nature at all; not after I learned that the whole property was to be paid for in debts.

Q. Isn't it a fact that there was a bid at that sale in money, a *cash* bid?

A. I don't know of any.

EXTRACT FROM TESTIMONY OF L. LANIER,
2d Printed Record, pp. 87, 92, 102, and 119.

Cross-Examination by Judge Chilton, of Counsel for Movants.

Q. Well, I will ask you this first: was there any agreement in writing as to the stock of the company, how it should be issued and how held?

A. None at all. The stock was issued to each one of these incorporators to the extent of his claim.

Q. There was no money paid in on the stock?

A. No, sir; the stock was issued to the bondholders.

Q. So that when you re-organized you issued to each bondholder the stock of the corporation to the amount of the bonds he held?

A. Yes, sir.

Q. What was the capital stock of the corporation?

A. $65,000.00.

Q. The same as the bonds?

A. Yes, sir.

Q. You have stated already that the bonds were issued as a substitute for the bonds taken up in this purchase.

A. Yes, sir.

Q. The bonds issued were $65,000.00?

A. Yes, sir.

Q. A new issue of bonds by the Galeton Company?

A. Yes, sir.

Q. Then you issued to each bondholder an amount of stock equal to the amount of bonds he held?

A. Stock was issued to each of them prior to the issue of the bonds.

A. The whole stock was transferred to the West Point Manufacturing Company in consideration of their advancing this money.

Q. Advancing who this money?

A. Money to pay the costs in the case.

Q. The West Point Manufacturing Company, then, paid the costs?

A. That stock goes to the individual stockholders unless——

Q. Was the stock transferred to the West Point Company then?

A. Yes, sir.

Q. Now, are the individuals composing the directory of the West Point Manufacturing Company the same as those composing the directory of the Galeton Cotton Mills?

A. Yes, sir.

Q. It is all run under one management?

A. Yes, sir; the same president and the same secretary and treasurer.

Q. So you issued stock to the amount of $65,000.00, and bonds to the amount of $65,000.00 on this property?

A. Yes, sir.

Q. How long after your purchase?

A. Immediately afterwards.

Q. I believe you stated that there was no cash paid in on the stock?

A. The cash was in payment of the costs—$10,000.00.

Q. That, you say, was a loan?

A. That was.

Q. I will ask you whether there was any cash paid in by the stockholders for the stock?

A. Except as to the amount; that's all paid in.

Q. The $10,000 that you say you borrowed, do you consider that as part of the capital stock; who paid it; and on whose stock was it paid?

A. That was paid by the West Point Manufacturing Company.

Q. When?

A. Immediately after the sale, when they bought the property.

Q. When they bought the stock from the bondholders to whom it had been transferred?

A. In about thirty different places.

Q. When the West Point Mills bought that stock from the bondholders to whom it was originally issued, they paid, or secured to be paid, the $10,000 to Hooper; is that it?

A. Well, there were other amounts paid besides that; $10,000 didn't cover the cash that was paid.

Q. $10,000 didn't cover the cash that was paid into court?

A. It was not quite all of it; some more over that.

Q. How much more?

A. I don't remember now.

Q. As much as a thousand dollars?

A. I should think there was that.

Q. Can you give me the items?

A. No, sir.

Q. What you paid was paid into court, wasn't it?

A. No, sir; $10,000 was paid into court. Yes, sir; whatever was paid was paid into court.

Q. These bondholders when they held stock, and when it was issued to them, they paid no money on the stock, did they?

A. No, sir.

Q. What is your individual interest in this matter?

A. It is whatever my interest may be in the stock of the West Point Manufacturing Company.

Q. What is your interest in the stock of the West Point Manufacturing Company?

A. You mean the shares; the amount of my stock in the West Point Manufacturing Company?

Q. Your interest in the stock?

A. How many shares I own; is that your question?

Q. Yes.

A. I own 1,467 shares.

Q. What is the capital stock of that company?

A. Four hundred thousand dollars ($400,000).

Q. Does that include the stock that has been transferred by the Galeton Cotton Mills to it?

A. No, sir.

Q. Do you include in your fourteen hundred shares the stock of the Galeton Cotton Mills?

A. No, sir.

Q. You say your proportion was fourteen hundred shares?

A. You asked me what my shares in the West Point Manufacturing Company was and I said 1,467 shares.

Q. And you say that your interest in the Galeton Cotton Mills is in proportion to your interest in the West Point Mills?

A. Yes, sir.

Q. What is the par value of the shares of the West Point Mills?

A. $100.00.

Q. So you own 1,467?

A. $146,700.00 out of $400,000.00.

Q. You say you had two conversations during the crying of the property?

A. Only one conversation before I made a bid.

Q. What was your bid?

A. $66,000.00, raising his $1,000.00.

Q. And you had but one conversation with him prior to that?

A. Prior to that bid.

Q. How much (insurance) was on the property at the time you bought it?

A. There is no telling. I don't know. I suppose about $200,000.00.

Q. Don't you know for what amount that property had been insured, the main building and this machinery, for several years?

A. I don't know. They could have insured it to that extent if they had wanted to.

Q. You were once the manager of the Alabama and Georgia Manufacturing Company?

A. Yes, sir; up to 1880.

Q. How much was it insured for during that period?

A. I do not remember.

Q. Have you no recollections?

A. No, sir. About $150,000.00, I suppose.

EXTRACT FROM AMENDED ANSWER.

ALABAMA, &C., MFG. CO., et al., *v.* J. J. ROBINSON, Trustee, et al. } Petition, &c., U. S. Circuit Court, Northern District of Georgia.

"And now come the defendants, and amend their answer, and aver as follows:

"The owners of the Galeton Cotton Mills state they did, on 10th day of October, 1892, assign and transfer to the West Point Manufacturing Company all of the stock of said cotton mills, in consideration of the sum of $16,600.00, in cash paid, and an agreement on part of said West Point Manufacturing Company to assume the mortgage debt of said Galeton Cotton Mills to the amount of $65,000.00, and an agreement to pay the said annual interest to become due from time to time on said bonded debt.

"After said Lanier, Dallis, and Kirby had transferred the interest purchased by them, as alleged in the answer to said Galeton Cotton Mills, the said cotton mills executed and delivered to L. Lanier and

A. T. Dallis a deed of trust covering all of said factory property, for the purpose of securing the negotiable mortgage bonds of said company, to the amount of said $65,000.00, and interest, and said West Point Manufacturing Company has paid the interest on said bonds as the same has accrued. Said bonds, so issued, are payable to bearer, and some of them are in the hands of *bona fide* holders, not parties to the original transactions referred to."

DORSEY, BREWSTER & HOWELL,
B. F. ABBOTT,
Defendant's Solicitors.

EXTRACT FROM THE TESTIMONY OF W. T. HUGULEY, WITNESS FOR THE HUGULEY MANUFACTURING COMPANY.

(*Direct interrogatories. Answers to.*)

"I never, at any time, voluntarily abandoned the first appeal. Our failure to prosecute it was from sheer inability to make other than the supersedeas bond, as explained (*i. e.*, by the American Surety Company). Our inability grew out of the following facts:

"1. Because we had turned over in 1888 to Fisher, the receiver of the Alabama and Georgia Manufacturing Company, a large amount of 'quick assets' (about $40,000), in self-defense, having the following order of court (May 22, 1889), passed:

"*Said Fisher, receiver, shall promptly pay the past due interest, and the interest to accrue, when due, on the first mortgage bonds of said corporation out of any funds he may have while he remains in office.*

"The receiver, thus charged with this particular duty, did pay said interest and continued to act under said order up to date of said alleged default, and it is now insisted that said receiver *had in hand on the date of said alleged default ample cash funds with which to pay said interest*, and he undoubtedly would have paid said interest had proper demand been made on him. It was his duty, as the only legal representative (except the president) of the Alabama and Georgia Manufacturing Company to pay said interest, and failing to have done so, he should have taken steps, with the funds in hand, to have aided in making the supersedeas bond, and thus avert the foreclosure. Though importuned to do so, he took no steps to carry out said original order of the State court, and thus the funds in his hands were not available in the protection of his said trust."

* * * * * * * *

"In conclusion, it is proper for me to explain that, because of the order of the State court, I had to transfer to the receiver about

$40,000 of 'quick assets,' and in view of the special order of court charging him with the particular duty to pay said interest, and knowing he had ample cash in hand, I specially relied on him to meet the interest and otherwise take such steps as would protect his said trust under the circumstances.

"Being 'tied up,' as explained, both through the receiver and the contract with said D. Jannopoulo, and embarrassed by the litigation, my firm and corporation were so 'handicapped' that I could not make the supersedeas bond locally, particularly within a day or two allotted me after ascertaining the Surety Company's bond had been rejected."

Interrogatory 9. "I was present at the receiver's sale at Hamilton, Georgia, in January, 1890. The property was then sold, as follows:

1.—Subject to the 1st mortgage bonds.....	$65,000 00
2.—Subject to certain Alabama executions in favor of Bank of La Fayette, Doss, et al., now owned by us (about).....	16,000 00
3.—Executions in favor of W. H. Huguley & Co., considered as *cash*.....	56,880 00
4.—Cash from W. H. Huguley & Co.....	12,120 00
Total cost (as to Huguley M'f'g Co.).....	$150,000 00

The next highest bid was within $500.00 of the bid at which the property was knocked down. *It was made by L. Lanier, presumably for the Lanier-Boynton syndicate*, and had it prevailed, they would have assumed:

1.—The First Mortgage Bonds....	$65,000 00
2.—And then had to pay *cash*.....	84,500 00
Equivalent to cash bid of.....	$149,500 00

"Under interrogatories 5th and 6th, I have already testified that the physical condition of the property, on September 6, 1892, had been improved 40 or 50 per cent. over the physical condition at the time of the receiver's sale in January, 1890, and at that time about $20,000.00 of improvements had been added by the Huguley Manufacturing Company between said dates.

Interrogatory 10. On each of said dates, viz., July 1, 1890, January 1, 1891, and September 6, 1892, respectively, we were carrying on the main building and machinery therein, alone, in the best stock companies insurance to the amount of $200,000.00.

I attach hereto, marked "Exhibit H," the pages 44–47–48 from the printed record in this cause, which contain extracts from the testimony of M. B. Torbett, confirming the amount of insurance carried, and likewise proving that the first $65,000.00 of said $200,000.00, had been duly and properly set apart in favor of the first mortgage bondholders.

The difference, at said dates, between the *actual* and the *insurable* value of such cotton mill properties is always 15 to 20 per cent. in favor of the actual value; that is to say, that much margin above the insurable value being required. This was the basis upon which our property was estimated by Mr. Torbett and all the other insurance experts whose particular business it was to visit and inspect the mill from time to time.

Answer to Cross-Interrogatory No. 9. "The Alabama and Georgia Manufacturing Company did have interest in said litigation as principal defendant. All its interest in the *plant only*, was sold at the receiver's sale at Hamilton, but this by no means exhausted all the assets of the company. At the time of the sale of this realty the receiver of the State Court still held in his possession a large amount of supplies and findings, and also cash and other 'quick-assets,' valued at about $20,000.00, all of which were available to meet the interest on the first mortgage bonds in conformity with the express order of the State Court of May 22, 1889, wherein it was specially enjoined on said receiver to pay promptly 'out of any funds of the corporation he may have so long as he remains in office' the interest on said bonds. Suffice it, the receiver is still 'in office' and was 'in office' on January 1, 1891, and on that date *had ample cash funds with which to have promptly paid the interest had due demand been made upon him.*"

Answer to Interrogatory 5. "In consequence of the receivership, which dated from October, 1888, the improvements and betterments, which for years prior thereto had been steadily going on, necessarily were ceased pending the receivership; little or no new supplies and findings, etc., were purchased even during the time the mill was kept running, and finally, about June, 1889, *by reason of certain attachments levied on the 'quick-assets'* of the receiver (at that time amounting to about $25,000.00), the receiver was compelled to close down the mill." * * *

Answer to Interrogatory 6. "Notably one of the biggest improvements instituted consisted in the thorough overhauling of all the English spinning frames (about 2,000 spindles), which by the application

of a new device increased their revolutions 50 per cent. and made them as efficient as the latest improved spinning. In addition to this, all the new machinery which had been bought in 1887–8, including the 12 40-inch looms, were applied, together with the 40 36-inch looms and outfit. All these repairs, new machinery, betterments, etc., were accomplished at an outlay of $15,000.00 to $20,000.00.

"During the administration of The Huguley Manufacturing Company, new supplies and findings were purchased at a cost of $11,000.00."

From the foregoing, it will be seen that from the date they succeeded to the property in January, 1890, the steady purpose and policy of the Huguley Manufacturing Company was to bring the mill up to the highest standard of efficiency. I can therefore answer, of my own knowledge, that at the time of the sale under the decree to Dallis, Lanier & Kirby, the physical condition of said plant and machinery was most excellent.

As more than half of the machinery had been applied within an average of 4 or 5 years, and much of it as late as 1887–8, all at a cost of exceeding $100,000.00, with the overhauling mentioned, the equipment on September 6, 1892, as an entirety, was well nigh modern, certainly for the purposes designed was well capacitated to turn out a maximum production at minimum cost.

As compared with the condition of the plant and machinery during the administration of the Alabama and Georgia Manufacturing Company, particularly during the interim of the receivership, the condition of and capacity of the Huguley Manufacturing Company's plant at the time they vacated on September 6, 1892, was decidedly better than it had ever been—by experts such as Owen, Higgenbothem and others, reckoned at 25 to 100 per cent. better.

As nearly as I can approximate, the increased efficiency and capacity of the plant, as a whole, on September 6, 1892, was fully 40 to 50 per cent.

EXTRACT FROM THE TESTIMONY OF M. B. TORBETT, INSURANCE EXPERT AND AGENT, WITNESS FOR MOVANTS AND INTERVENERS.

(Direct examination by Col. N. J. Hammond, of Counsel for the Huguley Manufacturing Company, Movants, etc.)

Q. To whom was the insurance payable?

A. To Robinson, Yancey and Huguley.

Q. Is that insurance payable to the different persons and to the different amounts there stated in a mere arbitrary thing, or was it fixed by inspection?

A. When it was turned over to me I went there; went over the mill, and made a thorough inspection.

Q. What proportion is there between the value of the property and the $200,000.00 of aggregate insurance represented on said list?

A. *I thought it worth more than the* $200,000.00 *or else I would not have taken the risk.*

Q. What was and is the usual proportion between *actual and insurable* value?

A. *On manufacturing property like this we always have actual value at least* 15 *per cent. or* 20 *per cent. larger than the insurable.* I visit the mill at least twice a year for inspection.

Q. Do you know whether in that time the property has increased or decreased in value?

A. I do not think it has decreased, *for they seem to be making improvements.*

EXTRACTS FROM TESTIMONY OF G. A. HUGULEY, WITNESS FOR HUGULEY MANUFACTURING COMPANY, MOVANTS.

Answers to direct interrogatories:

Interrogatory 1. I know the parties. I reside in Chambers county, Ala., two miles from West Point, Ga. * * *

Interrogatory 2. I was one of the bondholders of the Alabama and Georgia Manufacturing Company, owning $2,500.00 of said bonds. I also represented the bonds owned by Mrs. F. H. Huguley. Before the sale of the mill belonging to said company (September 6, 1892), I was present at certain meetings of the bondholders of said company.

Interrogatory 3. About two weeks prior to said sale there was a formal meeting or conference of the bondholders which was held in the Young Men's Library rooms, in Lanier's Bank building. Said meeting had been called by L. Lanier, who, with A. T. Dallis, was most conspicuous and acted as chief spokesman during the deliberations which took place. J. T. Kirby, of Newnan, Georgia, acted as secretary.

There were two classes or wings of the bondholders, one of which consisted of those bondholders who were the real parties complainant in the action filed by L. Lanier and others looking to the foreclosure of their bonds. These complainants were Mrs. Lizzie F. Yancey, Miss Susie Huguley, A. T. Dallis, estate of M. T. Walker, and L. D. Hutchinson, representing in all about $38,000.00 of the first mortgage bonds. These were the parties who had declined to

receive their interest and had allowed their names used in the filing of said suit.

The other class of bondholders, who had collected their interest on due presentment of their coupons at the proper time and at the proper place and to the proper person, and who, accordingly, never had any grievance, and therefore were never parties to said suit, consisted of myself, Mrs. F. H. Huguley, Mrs. Sallie Huguley, the Atlanta National Bank, J. F. Hooper, the estate of Elliott, and D. Jannopoulo, representing about $27,000.00 of said first mortgage bonds.

In explaining the object of said caucus or conference, L. Lanier stated that the object of said meeting was to induce all the bondholders to join together and "pool" their bonds for their mutual benefit and protection. To this end, he recommended that all the bonds should be surrendered or consigned to a committee consisting of L. Lanier, A. T. Dallis, and J. T. Kirby, which said committee were to bid all the bonds at said sale for the joint account, benefit, and protection of said bondholders, whether complainants or non-complainants. He stated that in this manner all parties concerned would either be able to buy the mill or in the event their bid did not prevail, we would be all assured of getting par at least for our bonds.

It was distinctly stated and understood that this committee was to receive our bonds in trust, and as such trustees they were to act for all the bondholders to the best interest of each and all.

Among other arguments used to carry his point, L. Lanier stated that in the event the bondholders' bid prevailed at said sale, said committee would be charged with the duty to issue bonds or stock on the *pro rata* basis, each person's interest in and to said property being represented in proportion to the amount of bonds held or contributed by each at the time of making said bid.

Another argument used by L. Lanier to induce myself and the other parties who had received their interest to pool our bonds in the purchase along with the real parties complainant, was the statement that even if we did not so pool we were liable for our share of the costs, just the same as those who had prosecuted the suit.

A. T. Dallis corroborated all these statements made by L. Lanier. Still another promise was made by L. Lanier to induce us to adopt his plans. He assured us that in the event the bondholders' bid should prevail, the new company, which the bondholders as purchasers should organize, would see to it that large improvements, repairs, machinery, etc., would be immediately applied, thus enhancing the value of the property as a security to the bondholders.

Interrogatory 4. The argument advanced by L. Lanier as a reason why decisive action on the part of the bondholders was necessary, and the one which seemed to carry with it the greatest weight with all the bondholders, was the *positive* and *unqualified* statement made in that caucus by L. Lanier that the mill *was not insured, and in the event of fire that the bondholders would suffer total loss.*

Answer to Interrogatory 5. Yes, there was another meeting or conference of the bondholders, which was held in Lanier's or Dallis's room in the Kimball House on the morning just preceding the sale of September 6, 1892.

The object of said caucus, as explained by L. Lanier, was to give Mrs. Sallie Huguley a final opportunity to join said pool, but particularly for the purpose of requiring all the bondholders to give their consent to the committee (Lanier, Dallis & Kirby) to hypothecate or pledge their bonds with Jno. F. Hooper, this being the condition exacted by Hooper before he would advance the $10,000 required by the court as the initial payment on said purchase. This arrangement had been made with Hooper by the committee in advance of our arrival in Atlanta, the committee having agreed to pay one per cent. per month interest on said money.

There was still another meeting or conference of the bondholders held in the Young Men's Library in West Point, Georgia, whereat we went through a farcical process of juggling, whereby L. Lanier first issued to the subscribers to the pool a batch of Galeton Cotton Mills' stock, or papers representing stock; then required us to surrender the latter and in its stead he gave us a receipt calling for as many bonds as we had stock.

Subsequently, two or three weeks thereafter, these said receipts were called in by him, and again he substituted therefor the bonds (so called) of the "Galeton Cotton Mills Company, of Chambers county, Alabama," which alleged bonds are without any power of sale, and contain on their face no guarantee on the part of the trustee that the property was to be kept duly insured to the amount of the bonds, both of which provisions are expressly stipulated on the face of the original bonds surrendered by me to the committee.

I was taxed with costs amounting to about four or five per cent. of my holdings, the justice of which I fail to see, since I have never been a party complainant in said suit, but on the contrary I, with the others mentioned, have repudiated said action as a fraud.

Cross-interrogatory 3. "This committee (Lanier, Dallis, and Kirby), though charged with the duty to take care of the interests entrusted to them, immediately after the sale ceased to act as a whole; L. Lanier having been the sole person who cut any figure in the distribution of the bonds." * * *

Cross-interrogatory 5. "I have never had any conversation with either of the counsel for movants. I came to testify in the case for several reasons. In the first place, because I feel that great injustice has been done not only to W. H. Huguley & Co. and the Huguley Manufacturing Company, but also to myself and every other bondholder, whether complainant or non-complainant, who has allowed himself influenced by L. Lanier. In the second place, because certain representations made to myself and others of the bondholders by L. Lanier for the purpose of inducing us to allow our bonds pooled in said purchase were not true. In the third place, because I now know that I was so deceived to my absolute loss, not only in having been coerced into an arrangement which lost me a desirable investment, but subjecting me to a taxation of costs, etc., without having received in return anything like my *pro rata* interest to which I was entitled. The alleged Galeton bond itself having turned out to be nothing like as good a security as the original gilt-edge bond, which I was deceived into surrendering."

Answer to Interrogatory 6. "I admit that the object of my participation in said meetings was prompted mainly in self-defence, because I was led to believe that the representations made by L. Lanier as to *insurance* and other material statements were true, and so believing I was alarmed as to my security. I was especially influenced by his argument that if we did not pool with the complaining bondholders we might not get 50 cents on the dollar for our bonds. Being young and without legal advice and unduly alarmed, as I have since ascertained, I yielded to their importunities."

As to the property being "sacrificed," I cannot say positively how it affected others, but the suggestion was advanced that if we did not so pool the property might be sold and we be "mashed out," and many of us believed it.

Answer to Cross-Interogatory 7. As explained in preceding answer, I repeat that I believed "all that was done or said at the meeting inquired about." But, in the light of after events, I now realize that I was deceived, as explained, and that L. Lanier was actuated in all that was said and done not so much to protect bondholders, but to get possession of his rival's property without himself contributing one dollar to said purchase.

Answered, sworn to, and subscribed before us this the 11th day of June, 1894.

W. J. KIRBY, [L. S.]
Commissioner.

W. L. WILLIAMS, [L. S.]
Commissioner.

ANSWERS TO DIRECT INTERROGATORIES PROPOUNDED TO A. S. ELLIOTT, WITNESS FOR THE HUGULEY MFG. CO., MOVANTS AND INTERVENERS.

Answer to Interrogatory 1. Yes, I know the parties. I reside at the factory in controversy at River View, Chambers county, Alabama. * * *

Answer to Interrogatory 2. Individually I was not the owner of any of the bonds of the Alabama and Georgia Manufacturing Company, but I represented, as agent, seven thousand dollars ($7,000.00) of said bonds owned by my mother, sister, and brother.

I was present at two caucuses or conferences of the bondholders prior to said sale.

Answer to Interrogatory 3. The first meeting of the bondholders which I attended was held in the rooms of the Young Men's Library, in Lanier's Bank building, in West Point, Ga. The meeting was called by L. Lanier about two weeks prior to the date fixed for said sale. L. Lanier presided over the deliberations. He and A. T. Dallis took a most prominent part throughout the whole of these and subsequent proceedings. Mr. L. Lanier explained that he had a plan to urge which would protect the interests of all parties concerned.

There were two factions or parties of the bondholders, one consisting of Mrs. Lizzie Huguley Yancey, Miss Susie Huguley, the estate of M. T. Walker, A. T. Dallis, and L. D. Hutchinson, representing about $38,000.00 of the first mortgage bonds. These were the parties who had allowed the use of their names in the suit filed by L. Lanier and were the real complainants in said suit.

The other faction or party consisted of my family, Mrs. Sallie Huguley, Mrs. F. H. Huguley, G. A. Huguley, the Atlanta National Bank, J. F. Hooper, D. Jannopoulo, representiug $25,000.00 of said bonds. The latter class had collected their interest on presentment at the proper time and place, and therefore had never been parties to said litigation, but, on the contrary, had bitterly repudiated the whole attempt at foreclosure. Mr Lanier explained that to carry out his policy it would be necessary for both these factions to unite and pool their bonds, and urged that the bonds should be intrusted to a committee consisting of L. Lanier, A. T. Dallis and J. T. Kirby, who should act as agents or trustees for all the bondholders, and bid the full amount of all the bonds so pooled, for the joint account, interest and protection of said bondholders.

Acting upon Mr. Lanier's suggestion, R. A. Freeman, Mr. Lanier's attorney, drew up a certain agreement, which was signed by all

present except Mrs. Sallie Huguley. I did not keep a copy, but was prevailed upon to sign it upon the representations then made by L. Lanier.

In support of his plan, L. Lanier stated that by thus pooling, the committee could either bid the full amount of all the bonds, and thus guarantee the holders at least par, or in the event our bid should prevail we should own the property on a *pro rata* basis, in proportion to the amount of bonds each contributed to the purchase. He further promised that if the property was knocked down to the bondholders the new company, which the new company would organize, were to institute at once repairs and improvements thus increasing the security of the bondholders.

A. T. Dallis ratified all these representations of L. Lanier.

Answer to Interrogatory 4. The principal reason assigned by L. Lanier for prompt action on the part of the bondholders, was that the property *had not been properly insured and in the event of fire the bondholders would suffer serious loss.*

This statement he made in said caucus or conference, and greatly alarmed the bondholders, and more than anything else induced them to pool.

More than once he told me the same thing in private conversations also.

Answer to Interrogatory 5. There was a meeting of the bondholders in L. Lanier's room in the Kimball House on the morning the sale took place—a few hours before. The object of the meeting as explained by L. Lanier, was to afford Mrs. Sallie Huguley a chance to come into the pool, but especially for the purpose of authorizing the committee to turn over to the Atlanta National Bank the first mortgage bonds which we had surrendered before leaving West Point, said bank to hold same as security or collateral for J. F. Hooper for the $10,000.00 which L. Lanier had borrowed from Hooper some time before leaving West Point, on a rate of one per cent. per month interest, I think.

ANSWERS TO DIRECT INTERROGATORIES PROPOUNDED TO MRS. SARAH H. KYLE, WITNESS FOR THE HUGULEY MANUFACTURING COMPANY MOVANT AND INTERVENER.

Answer to 1st Interrogatory. My name prior to my marriage was Sarah H. Huguley.

Answer to 2d Interrogatory. Prior to said sale on September 6, 1892, there were such meetings of the bondholders of the Alabama and Georgia Manufacturing Company. The one I was prevailed

upon to attend was held in the rooms of the Young Men's Library in the Lanier Bank building. Present besides myself, G. A. Huguley, J. Elliott, Miss Lula Elliott, A. T. Dallis, L. D. Hutchinson, J. T. Kirby, L. Lanier and others. This meeting was called by L. Lanier about two weeks in advance of said sale of the property. Having yielded to the importunity of A. T. Dallis and others, who knew that I had never at any time been a party to said suit, I only consented to attend said caucus somewhat reluctantly. I, under protest, being actuated largely by curiosity, consequently not feeling in sympathy with the real complainants, and having no confidence whatever in L. Lanier, who himself I believe, did not own one dollar of the bonds, had used the names of others to engineer the suit. I held aloof and, although noticing closely all which transpired, I took little or no part in the proceedings. The purpose of the meeting, as explained by Mr. L. Lanier, was to induce those of us bondholders, consisting of myself, Mrs. F. H. Huguley, G. A. Huguley, the Elliotts, the Atlanta National Bank, J. F. Hooper, and D. Jannopoulo, who represented about $25,000.00 of the first mortgage bonds, and who, having always promptly collected our interest had never been parties to said suit, to join with the real parties complaintant consisting of Mrs. Lizzie Yancey, Miss Susan Huguley, the estate of Walker, and A. T. Dallis, representing in all about $38,000.00 of the bonds, and pool our bonds for the purpose of buying in the factory property at the sale.

Answer to 3d Interrogatory. "Mr. L. Lanier was present at the meeting I attended, presided over same or acted as chief spokesman, taking a most conspicious part throughout the entire proceedings. Among other arguments used to induce us to pool with the complaining bondholders was *a positive and unqualified statement, made in that caucus by L. Lanier, that the mill was at that time not insured and that in case of fire the bondholders would suffer total loss.*"

Answer to Interrogatory 4. "Upon my insisting that I knew the property was insured, because I had been told so by W. T. Huguley, one of the trustees and the party chiefly concerned in protecting the property; L. Lanier and A. T. Dallis in turn *repeated that the matter of insurance had been investigated and that they knew that there was no insurance upon the property.*"

Answer to Interrogatory 5. "Mr. Lanier urged the bondholders to pool their bonds, as explained, and in answer to second interrogatory. His scheme, as pointed out by him, was that a committee should be created or appointed by the bondholders, consisting of L. Lanier,

A. T. Dallis, J. T. Kirby, into whose hands, as agents or trustees, all the bonds were to be consigned. Said committee was to be vested with full authority and charged with the duty to bid the full amount of all the bonds so pooled for the joint protection and interest of all subscribers or bondholders. The object thus to be obtained was for them to bid the property up to an amount which would net each bondholder at least par, or in the event the bid prevailed then said committee was, of course, to see to it that each participant in the purchase should receive his *pro rata* share as represented by the amount of bonds thus contributed in and to said purchase. Acting upon L. Lanier's advice and representations all the bondholders present did sign or agree to sign an agreement to be prepared in accordance with the above by Freeman, Lanier's attorney, except myself. I declined to sign. For my part, believing that L. Lanier did not, individually, own one dollar of the bonds, and believing that he was setting a trap for his victims, and especially because I had no earthly confidence in the man I refused to join with the others in following his leadership in any connection. Accordingly, I placed my bonds in the hands of my attorney, Col. N. J. Hammond, to protect my interest in the premises, and it was in my interest and protection alone, and for no one else except his own, that he submitted that first bid of sixty-five thousand dollars ($65,000.00). *In face of this bid, and despite the fact that I had never been a party to the suit, but, on the contrary, I had informed J. J. Robinson, trustee, that I repudiated the whole foreclosure proceedings as a fraud, I was yet unjustly taxed on my six thousand dollars* ($6,000.00) *of bonds about twenty per cent.* (20%), *realizing only about eighty per cent.* (80%) *cash on the face value of my bonds.* With the exception of myself and D. Jannopoulo all the other bondholders, whether complainants or non-complainants, joined in the purchase of said property at said sale."

ANSWERS TO CROSS-INTERROGATORIES PROPOUNDED TO MRS. SARAH H. KYLE.

To 6th Cross-Interrogatory, she answers: "In my answer to the direct interrogatories propounded, I have already told all I know concerning the meeting of the bondholders and the object of same. Holding bonds secured by first mortgage of $65,000.00 on a property whose plant alone had cost over $320,000.00, whose main building and machinery therein alone was insured for $200,000.00 of which the first $65,000.00 had been set apart for the bondholders, representing a security whose interest had always been paid

promptly to the day when due presentment was made at the proper time and at the proper place and to a proper person, I for one failed to see, in the first place, the common sense for any bondholder allowing the use of his name by L. Lanier in instituting any foreclosure at all. I certainly fail to see any cause for the grave apprehensions felt and the extraordinary precautions urged by L. Lanier in the meetings to the end that loss might be averted to the bondholders from a sale which had been brought about by their own folly. Therefore, I, for one, never saw either occasion or necessity of devising a plan to keep the property from being 'sacrificed.' I could not conceive how such a 'sacrifice' was possible, at least as to those bondholders who had never been parties to said suit, unless, indeed, such sacrifice should result from their property being eaten up by court costs, of which I had already been taxed unjustly about 20 per cent. of my holdings."

"I have stated all I know of the meeting referred to in my answers to direct and cross-interrogatories."

To Cross-Interrogatory 7, she answers: "I do not know that all that was done or said at the meeting inquired about was done to protect the bondholders against loss. On the contrary, while urging his scheme of pooling for the nominal and ostensible purpose of protecting the bondholders, from all which transpired at said meeting and in connection therewith, particularly in view of the reckless misstatements made about insurance, etc., I was impressed with the belief that the real and sole purpose of L. Lanier, who was the most conspicious in all that was done or said, was to secure the control of the mill property without contributing, if possible, one dollar in and to said purchase. How accurate was the conclusion and how well Mr. L. Lanier succeeded is shown by the fact that, after saddling on his victims court costs, aggregating about 20 per cent. of their holdings, I am informed that in recognition of the vested rights of ownership acquired at said sale, L. Lanier has so distributed a so-called bond, in reality nothing more than a mortgage of the Galeton Cotton Mills, of Chambers county, Alabama, in proportion to a like amount of the original first mortgage of the Alabama and Georgia Manufacturing Company bonds. Said Galeton mill bonds, as witness is informed (and witness holds one of said bonds), is without power of sale and of no guarantee from the trustee that the insurance will be kept up. Witness is further informed that said L. Lanier, and who she believes never contributed one dollar in and to said purchase, either of bonds or money, has issued to himself all of the capital stock of the Galeton Cotton Mills

except $500.00 cash issued to A. T. Dallis and L. J. Blackman, which said capital stock in equity should have been distributed *pro rata* among those of the bondholders of the Alabama and Georgia Manufacturing Company, who had really contributed to the purchase of the property.

SARAH H. KYLE."

Answered, sworn to and subscribed before us this the 13th day of June, 1894, at White Cliff Springs, Monroe county, Tenn.

R. F. POND. [SEAL.]
A. B. TADLOCK. [SEAL.]

EXTRACT FROM ORIGINAL BILL OF COMPLAINT *in re* J. J. ROBINSON, TRUSTEE, *v.* THE ALABAMA & GEORGIA MANUFACTURING COMPANY *et al.*, AS TO THE MATTER OF FAILURE TO KEEP UP INSURANCE, AS ALLEGED IN SAID BILL.

"Among other things it is provided in said deed of trust, for further security of the holders of said bonds and coupons, that said Alabama and Georgia Manufacturing Company shall keep said property covered by said deed of trust insured against loss by fire in good responsible companies to the extent of sixty-five thousand dollars ($65,000.00).

"*Said company has failed to keep said insurance as provided, as orator is informed.*"

EXTRACT FROM TESTIMONY OF J. J. ROBINSON, TRUSTEE, RELATING TO ABOVE.

Direct examination by Col. N. J. Hammond, of counsel for the Huguley Manufacturing Company, Movants and Intervenors:

Interrogatory 1. "At whose instance did you, as trustee, authorize your name to be used in the bringing of said suit?" etc.

Interrogatory 2. "Upon whose information did you state in your said bill that said Alabama and Georgia Manufacturing Company's property was not insured as required by the contract?"

Answer to direct interrogatory 1. "I was requested by Mr. L. Lanier and N. D. Denson, as executor of the will of M. T. Walker, deceased, to institute suit to collect the bonds involved in this suit. I received a letter from Mr. L. Lanier asking me to do so. I did not preserve the letter and I cannot attach it. I know it was signed by Mr. Lanier. It was his handwriting which I know. He also requested me in person. * * * I have no personal knowledge that L. Lanier held any of the bonds.

To the second interrogatory, he says:

"I received information about the insurance from *Mr. L. Lanier* and W. S. Jackson, of West Point."

To the 3d Interrogatory. "I do not remember the exact date, but it was between the 1st day of January, 1891, and the time the suit was brought. I had received the information about the insurance for several months prior to the bringing of the suit and up to the time the suit was brought."

TESTIMONY OF L. LANIER, ADMITTING HAVING REQUESTED ROBINSON, TRUSTEE, TO BRING SUIT.

To 16th Cross-Interrogatory, L. Lanier answers: "Yes, I wrote him (Robinson), requesting him to take action in the matter, signed only by myself; it was mailed to him and I have not seen it since; can't say who began the project; it was the desire of nearly all the holders of the bonds as expressed to me.

EXTRACT FROM ANSWER OF THE HUGULEY MFG. CO. TO BILL OF COMPLAINT.

"Said Laniers are interested in a rival cotton mill on the same river, about two and a half miles above this mill, and these defendants think said Laniers are much more interested in crippling the Huguley Manufacturing Company than in collecting said coupons or bonds."

EXTRACT FROM THE TESTIMONY OF JOHN C. ORRICK, ATTORNEY AND WITNESS FOR THE HUGULEY MANUFACTURING COMPANY.

To Cross-Interrogatory 2, he answers: "I was the regular attorney for the Huguley Manufacturing Company from the time it was organized. * * *

"I know that Mr. Lanier was the chief instigator among the bondholders of the foreclosure proceedings; that the Huguley Manufacturing Company had deposited the interest money at the bank at Atlanta, Ga., and that he, with others, wrongfully refused to accept the money in payment of their coupons due at that time; that Lanier was interested in breaking down the Huguley Manufacturing Company, as it was a competitor of a mill which he managed a few miles off. So, through the action of Lanier and others, the Huguley Manufacturing Company had to run its mill with this foreclosure proceeding pending brought on by Lanier and other bondholders."

35. The decree of March 30, 1895, on which all subsequent proceedings in this case are based, required the payment of the entire mortgage debt, and all the interest coupons that had not been paid and accepted before the date of the filing of the bill on "ninety bonds" for the total sum of $45,000.00 principal, and $17,005.92 interest, which included interest on the coupons from the day they fell due, *on their face*, and ordered the sale of the entire property, unless these sums were paid within 30 days from the date of the decree, with interest at 8 per cent. per annum on those sums, from November 1, 1894, until paid, that being the date up to which the master had computed the sum of the principal of the debt, and the unpaid coupons thereon, with interest on the coupons; thus compounding the interest on the coupons, and giving interest on the principal debt to the amount of $45,000.00 from the first of November, 1894.

This part of the decree, Section 9, was manifest error under the decision in Fosdick's case, 106 U. S. Reports, page 75, and that error alone rendered nugatory all subsequent proceedings based upon it.

And that part of the decree is repugnant to Section 1 of the same decree in which "the court finds that default was made in the payment of the interest on all the bonds issued by the Alabama and Georgia Manufacturing Company," and this finding is not supported by the evidence in the case.

And Section 9 of the decree is in conflict with Section 7, which declares that the bonds described by numbers in Section 2 of the decree, "were NOT due at the time of the filing of this suit, and said plaintiff trustee is NOT entitled to recover therefor."

This finding and decree in Section 7 necessarily dismisses the bill as to the 40 bonds described in Section 2 of the decree, since no party to the record was "entitled to recover therefor," and those bondholders who are named in the decree, but not named or in any way identified in the bill, were left without the benevolent care of Robinson, trustee, exposed to the rapacity of Lanier, his director in the litigation.

Some of the debts, to the amount of $20,000.00, which "were NOT due at the time of the filing of this suit, had their mortgage lien removed from the property by the decree of sale and transferred to the proceeds to be paid into court on distribution, in amounts according to the findings of the special master." Those findings were made under decrees that were entered in a cause in which the alleged trustee was "not entitled to recover" on any bond or coupon held

hem. They can accept the terms offered in Section 11 of the ee, or "forever after hold their peace." This is a rude reversal ordick's case, it must be admitted.

hen the court reached Section 8 of its decree, it swept back to late of the deed, January, 1884, and barred the equity of re- ption of the Alabama and Georgia Manufacturing Company, any one claiming under or through it since the date of the exe- n of said trust deed."

he bill in this case asks no such relief as relates *back to the date he deed.*

ie bill asks that said corporation, "and any and all persons ning under it, be absolutely and forever foreclosed of and from equity of redemption in and to said mortgaged premises and y part thereof," fixing no date when such foreclosure should effect.

osdick's case declares that the equity of redemption is a favorite court of equity. There are few, if any cases, in which that ly regard is manifested by limiting the life of such a favorite 0 days.

Non constat the bondholders who were excluded from the benefits suit which the trustee claimed was "for their best interests," ht, within a reasonable time, have preferred to pay those who e let into its benefits, thereby keeping the title in the trustee to ect their investment rather than to have their rights transferred n the lien on the property to a share in the proceeds of the perty under a sale to Lanier, at a loss to them of 35 per cent of r bonds. But they claim under the Alabama and Georgia Man cturing Company, back to the date of the deed in trust and they cut off by this decree of foreclosure, from all else but the ilege of participating in the proceeds of this sale, which dis- inates against them as purchasers, who can buy the prop- with bonds.

But this sweeping decree, which has no proof to support it, and issue tendered in the bill on which its legality could be tested, no fact stated in the bill to support it, was intended to forever the Huguley Manufacturing Company, in any court, in any te, from claiming rents and profits from Lanier and his associ- s in the Galeton Cotton Mills.

The Huguley Manufacturing Company had purchased the posses- n of this property and all the rights of the Alabama and Georgia nufacturing Company in it, under the decree of the Chancery urt of Troup county, Georgia, subject to the prior lien of the d of trust which is the foundation of this suit, and Robinson, as

a director of said company, was a party to that suit, and was conclusively bound by the decree rendered by that court.

They were holding possession under that decree, as is stated in the bill, and were not claiming adversely to the decree or the deed of trust. No complaint is made in the bill that they were holding the property adversely to Robinson, trustee. Their possession was lawful, peaceable, and friendly to the trust deed and its beneficiaries.

No receiver was appointed in this case, and no attempt was made to oust them of the possession until Lanier bought the property in September, 1892, when he was put into possession by the court. That decree was reversed. A sale of the property was again made in May, 1896, at which Lanier again became the purchaser; but the sale not finally confirmed and the deed ordered to be made until October 15, 1898.

In Fosdick's case, on page 71, the court say: "But in cases of strict foreclosure, so in cases of sale, the equity of the mortgagee is not exhausted until the sale actually confirmed; for if at any time prior he should bring into court for the mortgagee, the amount of the debt, interests, and costs, he will be allowed to redeem.

"It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption," citing Brine *v.* Insurance Company, 96 U. S. 627.

The Huguley Manufacturing Company, by the decree of the court in Georgia, stood in the shoes of the Alabama and Georgia Manufacturing Company as to every right to pay off the mortgage debt, and as to the right of possession, *lis pendens*.

It was to bar this right and to legalize the possession of the Galeton Cotton Mills under a decree that had been *reversed*, that this sweeping decree of foreclosure was made.

The circuit court held, under these circumstances, that the Galeton Cotton Mills was a mortgagee in possession under the decree which had been *reversed*, and that the Huguley Manufacturing Company was not entitled to the rents and profits up to May, 1896, when the property was again sold, and that Lanier, or the Galeton Cotton Mills, was not liable for rents from that date until October 15, 1898, when a deed was made to him *individually* on a purchase he made in May, 1896, during all of which period he held the possession of the property.

It seems inevitable that Fosdick's case must be overruled before Lanier or the Galeton Cotton Mills, is to have the character or the rights of a mortgagee in possession.

JOHN T. MORGAN,
Attorney for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, WILLIAM T. HUGULEY, AND THE ALABAMA AND GEORGIA MANUFACTURING COMPANY

vs.

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER.

In this case the undersigned, attorney for the appellants, begs leave to bring to the attention of the court, in connection with the first assignment of error, the case of Thompson *vs.* Wooster, 114 U. S. Reports, 104.

This case is cited by appellants on page 8 of their "brief in reply to the brief and argument of appellees on the motions for certiorari and to dismiss the appeal" filed in this case.

It was intended to cite this case again in the brief and argument of appellants on the merits of the case, but it was accidentally omitted.

The bearing of this case on the case at bar is in that pa
of the opinion of the court on page 113, as follows:

"It is thus seen that by our practice a *decree pro confe*
is not a decree as of course according to the prayer of t
bill, nor merely such as the complainant chooses to take
but that it is made (or should be made) *by the court, acco*
ing to what is proper to be decreed upon the statements of t
bill, assumed to be true."

No decree *pro confesso* was entered or considered by t
court at any time, and no valid decree was entered in t
cause on the issues of fact presented in the pleadings un
March 30, 1895, the decree rendered prior to that date fo
closing the mortgage having been reversed on appeal. T
decree of March 30, 1895, makes no reference to a *decree p*
confesso against W. T. Huguley, defendant.

The court further say: "Our rules do not require the cau
to be set down for hearing at a regular term, but, after t
entry of the order to take the bill *pro confesso*, the 18th ru
declares that thereupon the cause shall be proceeded
ex parte, and *the matter of the bill may be decreed by the co*
at any time after the expiration of thirty days from t
entry of such order, if it can be done without answer *and*
proper to be decreed. This language shows that the matt
of the bill ought at least to be opened and explained to t
court when the decree is applied for, so that the court ma
see that the decree is a proper one. The binding charact
of the decree, as declared in rule 17, renders it proper tha
this degree of precaution should be taken."

No such decree has been made by a court in this case,
even asked for, against defendant William T. Huguley, an
if any such decree is ever made in this case, it will be mad

by the Supreme Court, or by the circuit court under its mandate.

The decree *pro confesso* entered by complainants' counsel was merely interlocutory, and while it was proper to be made upon statements and averments as loose and indefinite as those in this bill, it only authorized proceedings *ex parte* in the cause. It did not become a final decree against Huguley until it had been "opened and explained to the court" when the decree of foreclosure was "applied for."

Such being the case, some court must ascertain and decree that the decree *pro confesso* entered on the order book "*was proper to be made.*" If the bill contained no equity on its face, or if the subject-matter of the suit or the action of the court is not within the jurisdiction of the court, Huguley has the right to raise that question in the case whenever, in any form, a court shall make that decree final.

Can a decree *pro confesso* be properly made by any court when the court has not the jurisdiction of the subject-matter of the suit or the jurisdiction to grant the prayer in the bill? In this case the circuit court had no more power under the Constitution and laws of the United States, which created the circuit court, to grant the prayer of the bill than if the prayer had been that the defendants should be imprisoned until they paid the money judgment rendered against them, and Huguley has the right to raise that question in the Supreme Court, where he is not in default, against the validity of these proceedings.

Huguley was evidently made a party defendant as trustee only to save the question of jurisdiction of the court on the ground of diverse citizenship. No *act* is charged against him that required an answer. His personal inter-

ests, so far as they are stated in the bill, were only in connection with his interests in the Huguley Manufacturing Company, which is a defendant and filed its answer in the case.

He was not recalcitrant or in voluntary or intentional contempt. He was made a defendant only because he could not be made a complainant without ousting the jurisdiction. A position of neutrality, as trustee, was assigned to him in the bill, and he left Robinson to take his own course, and Robinson has done so, led by Lanier, until he has destroyed the whole value of the trust that it was his duty to protect. He has no claim to equitable indulgence.

The powers of the circuit courts of the United States are all derived from the Constitution and laws of the United States, and any proceeding in said courts or any decree rendered by them presents a Federal question that no State court can conclusively determine if it includes the question of the power of the court to render such a decree or to entertain jurisdiction of such proceedings.

Such questions are not only Federal, but they are exclusively Federal, *because they partake of and rest upon the supremacy of the Federal judicial power.*

In the briefs of Messrs. Farrar and Chilton, on file, on the petition for a certiorari in this case there is a very able presentation of the principles and authorities that support the views of the appellants.

JOHN T. MORGAN,
Attorney for Appellants.

No. 94.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Office Supreme Court U.S.
FILED
JAN 18 1902
JAMES H. McKENNEY,
Clerk.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, AND WILLIAM T. HUGULEY,

Appellants,

versus

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER, *Appellees.*

Argument and Brief on the Merits of the Case.

McLAURIN & WELLES, AND
KING & SPALDING,
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Of Counsel.

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IN THE

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No. 94.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, AND WILLIAM T. HUGULEY, *Appellants*,

versus

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER, *Appellees*.

ARGUMENT AND BRIEF ON THE MERITS OF THE CASE BY McLAURIN & WELLES AND KING & SPALDING AND JOHN M. CHILTON, FOR APPELLANTS.

J. J. Robinson, a citizen of Alabama, and William T. Huguley, a citizen of Georgia, were the survivors of three trustees of a deed of trust executed by the Alabama and Georgia Manufacturing Company to secure an issue of bonds.

At the time of the execution of said deed and the creation of said trust, said Huguley was the mortgagor's vice-president and secretary, W. H. Huguley, president; and said Robinson, who was a director, was aware of W. T. Huguley's official relations at the time he accepted the trust.

Subsequently the Huguley Manufacturing Company purchased the mortgaged property at a judicial sale of the Georgia State Court under a decree against said mortgagor, said sale being made subject to said deed of trust, and the deed executed to said Huguley Manufacturing Company being expressed to be so subject.

The bonds secured by said trust deed required the payment of interest semi-annually, on the first days of January and July in each year. A default for six (6) months in payment of any interest installment matured the principal of the bonds, but expressly con-

ditional *upon a previous presentment and demand "at the office of the company in West Point, Georgia," and notice of non payment served on the president of the company, and the delay or refusal of payment for six months after such notice.*

A default was claimed in paying the interest due July 1, 1890. A remittance was started from St. Louis on the 29th day of December, 1890, to pay said interest, but a delay in opening the mail by the bank to which it was addressed, and the first of January being a legal holiday, caused the remittance for interest to be opened at the counter of the Atlanta National Bank, which had become, by consent of bondholders, the substituted place of payment, on January 2, 1891. The holders of a number of bonds, $22,000 in amount, however, accepted the interest and waived the default, leaving forty-three thousand dollars ($43,000) which were claimed to have matured as to the principal.

On the 21st day of January, 1891, J. J. Robinson (W. C. Yancey, a trustee, had previously died, and no successor had been chosen), as trustee, filed his bill of complaint against the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, also joining William T. Huguley as a party defendant, alleging that by reason of interest in the Huguley Manufacturing Company his interest was adverse to the holders of the bonds and that he should not be allowed to act as trustee or become a plaintiff in said suit. No relief was asked against Huguley, no averment was made of any demand on Huguley to foreclose, or of any refusal on his part to act.

The bill averred Robinson to be a citizen of Alabama. The defendants, including Huguley, were all alleged to be citizens of Georgia.

Had Huguley been joined as a complainant, or if he is to be arrayed on the plaintiff's side of the controversy, the controversy is not between citizens of different States.

The bill alleged that two corporations were chartered by the State of Georgia, known respectively as the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company, but was silent upon the point that the two corporations were chartered by the State of Alabama, of the same respective names, and that the *Alabama* corporations were each first so chartered and organized.

There was no consolidation of these corporations and none was shown.

Had either of these Alabama corporations been made defendants —being of the same State with complainant, Robinson,—the Circuit

Court of the United States would have had no jurisdiction of the cause.

The cause finally ripened into a decree foreclosing the trust deed and adjudging all of the bonds due and payable when only forty-five thousand ($45,000) dollars were decreed to be so due and payable.

The property was sold under this decree, which on appeal was reversed, and the sale decreed to be null and void. The purchase was by a committee representing all of the bondholders.

The defendant Huguley Manufacturing Company prayed for a writ of restitution, and the court required of it the payment of ten thousand ($10,000) dollars, claimed to have been paid "into court" in cash on said sale, as a condition precedent therefor, and that sum not being paid because no part of it was due or taxable against the Huguley Manufacturing Company, as evidenced by the court itself ultimately taxing it "*as between the bondholders themselves*," the court passed a new decree finding forty-five thousand ($45,000) dollars of the bonds due and payable, and directing a re-sale of the property to satisfy the mortgage debt. This was done pending an accounting to ascertain what sum for profits the purchaser, *who was the mortgagee in possession*, had received *pendente lite*.

By this decree the mortgage was foreclosed, and the payment to prevent foreclosure demanded of the *entire* sum of the defaulted bonds and interest thereon, when this sum should first have been reduced by the rents and profits of the mortgaged estate which had been received by the trustee as a mortgagee in possession.

This decree of sale was rendered March 30, 1895. It was not executed by a sale until the first Tuesday in May, 1896. In the meantime the charter of the Alabama and Georgia Manufacturing Company of Georgia (which was the only party of the name to the cause, and which alone had been called on by the decree to pay the debt or stand foreclosed) had expired by its limitation of thirty (30) years.

The property was bought in at the second sale by L. Lanier, as agent or trustee *for the bondholders*.

This sale was confirmed, *conditionally*, on June 25, 1896, and at that time a reference again made to ascertain the rents and profits for which the former purchasers must account. This was subsequently ascertained to be thirty-five thousand eight hundred seventeen and fifty-four one hundredths ($35,817.54) dollars.

The new purchaser *did not comply with his bid* as confirmed, and it was not until October 15, 1898, *two years, five months and nine*

days after the bid, that any pretense of compliance was made, whereupon, *after changing not only the terms but changing the parties*, the Circuit Court confirmed the sale and directed a deed made —not to the *bondholders* in whose name the property had been knocked down and the sale reported, but to *L. Lanier, individually*, and deed made thereunder.

The former purchasers, whose possession was not, and could not have been disturbed, and who held alone as a mortgagee in possession under the former order of the court, never accounted for the rents and issues from either September 6, 1892, up to May 6, 1896, or from the latter date up to the date of final confirmation on October 15, 1898.

Such rents would far more than have extinguished the mortgage debts and left the second purchaser in the position of one who for over two (2) years and five months had, without order of court, failed to comply with his bid, and who was therefore not entitled to these rents. And at the time he offered to comply and asked a change in the terms of confirmation, these additional rents and issues would alone far more than have extinguished the mortgaged debt.

Without in any way waiving the points discussed and urged in this cause by other counsel in other briefs, to which the attention of the court is respectfully invited, we submit the following suggestions on a few salient points.

I.

If the Supreme Court had no jurisdiction on appeal, it now has full jurisdiction under the writ of CERTIORARI *by which the record was brought before the court.*

It is claimed by the appellees in this case that the Supreme Court of the United States has no jurisdiction for the reason that it is a case involving jurisdictionally only the question of diverse citizenship, and that therefore, the judgment of the Circuit Court of Appeals is final under the statute of 1891, which provides "and the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

They overlook the further provision of the statute, which reads: "And *excepting always* that, in any such case as is hereinbefore

made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by *certiorari or otherwise*, any such case to be certified to the Supreme Court *for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*"

Admitting then, for the sake of argument, that an appeal could not properly lie, the Supreme Court has full jurisdiction over this case, as the record is now here, not under the appeal, but under a writ of *certiorari* granted by the Supreme Court, and the statute is explicit that the Supreme Court has full jurisdiction over it.

The proceedings attacked in this application have been continuous, were finally closed by the decree of the Circuit Court of Appeals by its judgment and decree of May 16, 1899, and are all contained in the record brought up.

Under the principles declared by this court in the case of the Panama Railroad Company *v.* Napier Shipping Company, 166 U. S., p. 280, the writ brings up the whole case for examination.

In that case the Circuit Court of Appeals, in February, 1892, on an appeal from the Circuit Court, reversed its decree below and entered a decree in favor of the Napier Shipping Company, declaring the Panama Railroad Company liable, and remanded the case to ascertain the damages. The District Court found the damages and entered a decree therefor. On the second appeal taken by the Panama Railroad Company, the Circuit Court of Appeals, in April, 1894, affirmed the judgment of the District Court.

On *certiorari* thereafter taken this court held that "while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when in the exercise of its supervisory jurisdiction it issues a writ of *certiorari* to bring up the whole record. Upon such writ the entire case is before us for examination."

The judgment of this court reversed all the decrees on the record against the Panama Railroad and reinstated the original decree of the District Court in its favor, entered in July, 1891.

In Amer. Construction Co. *v.* Jacksonville, Tampa and K. W. Ry. Co., and Same *v.* Penn. Co., for granting annuities, insurances on lives, &c. (decided March 27, 1893), 148 U. S. 372, it is said (summing up):

"The effect of these provisions is that, 'under the act of Congress of March 3, 1891,' in any case in which the jurisdiction of the Cir-

cuit Court depends entirely on the citizenship of the parties (as in the cases now before us), and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the Circuit Court of Appeals only; and the judgments of the latter court are final, unless either that court certifies questions or propositions of law to this court, or *else* this court, *by certiorari or otherwise, orders the whole case to be sent up for its review and determination.*"

McLish *v.* Roff, 141 U. S. 66, 35: 893.

See also *in re* Chetwood, 165 U. S. 443, 462.

"An appeal from a final decree in equity brings up all questions which were decided against the appellant."

Buckingham *v.* McLean, 13 How. 150, 14: 90.

The statute was intended to relieve the Supreme Court of the burdens of those cases where grave questions were not involved, but of which it had jurisdiction by reason of diverse citizenship, saving jurisdiction in other matters expressly and giving the Supreme Court authority to take jurisdiction by *certiorari* or otherwise of any excepted case of such importance as to justify review. It gives the Supreme Court an option as to whether or not to hear such cases. It exercises this option in passing upon the removal of the cause from the Circuit Court of Appeals to the Supreme Court. In this case *the option has been exercised*, and whatever might be the differences of opinion as to jurisdiction under the appeal there is no question that the Supreme Court *has already acquired and accepted jurisdiction under the writ of certiorari, and it has as plenary powers and duties as though this case did not fall in the excepted class.*

We contend, however, that this case does not fall within the excepted class. If no *other* jurisdictional question was involved than that of diverse citizenship, or if a Federal question arose in the case during its progress that was not in the case as originally filed, it might possibly come within the statute so far as the original appeal is concerned, but in this case the question was one of jurisdiction of the *subject matter*, inherent in the case, rendering it *void* when filed, *void* at every step, a *nullity* to be treated as such at whatever stage the defect was discovered. It involved property—lands on which is located a cotton duck mill plant and village—situated wholly *outside of the State* in which the court had jurisdiction, and as to the property within the State, consisting of a few detached, isolated islands, it was in the hands of a receiver appointed by a State court. The fact that the question was not raised at all points of the pro-

ceedings has nothing to do with it. The question of jurisdiction is one that every court in which a case comes is bound to inquire. Jurisdiction cannot be conferred by consent or by agreement, and it certainly cannot be created by negligence of counsel in not filing demurrers.

[See also in this connection the brief of our colleague, Hon. John T. Morgan, leading counsel, on application for *certiorari*, pp. 46–55, and see his last brief filed on same petition, particularly on pages 22–41 (Green cover).]

II.

The question of jurisdiction of the controversy lies at the root of every litigation in a Federal court. The court will inquire on its own behalf, and where jurisdiction has been wrongfully assumed will reverse the cause with directions to dismiss the entire proceeding.

"The rule is inflexible and without exception, as was said, upon full consideration, in *Mansfield, Coldwater, &c., Railway* v. *Swan*, 111 U. S. 379, 382, 'which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relations of the parties to it.' To the same effect are *King Bridge Co.* v. *Otoe County*, 120 U. S. 225; *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283; *Blacklock* v. *Small*, 127 U. S. 96, 105, and other cases."

Morris v. *Gilmer*, 129 U. S. 315, 325, 326.

In Morris *v.* Gilmer, 129 U. S. 325, this court said:

"But if the record disclose a controversy of which the court cannot properly take cognizance, its duty is to proceed no farther, and to dismiss the suit, and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct when the case is brought here for review. The rule is inflexible, and without exception, as was said, upon full consideration, in Mansfield, etc., Ry. Co. *v.* Swan, 111 U. S. 382."

And the court goes on and quotes *verbatim* the extract above made from that case, saying:

"It is an inflexible rule that the judicial power of the United States must not be exerted in a case to which it does not extend, even though both parties desire to have it exerted."

The language of Mr. Justice Curtis, in Dred Scott Case, 19 How. 566, cited and adopted.

In Parker *v.* Ormsby, 141 U. S. 83, Mr. Justice Harlan said:

"Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

Mansfield, etc., Ry. Co. *v.* Swan, 111 U. S. 382, 379.
King Bridge Co. *v.* Otoe County, 120 U. S. 225, 226.
Cameron *v.* Hodges, 127 U. S. 322, 325.
Colorado C. Min. Co. *v.* Turck, 150 U. S. 138, 37: 1030.

"On a writ of error or appeal, where the case comes from a Federal court, the first and fundamental question is that of 'jurisdiction,' first of the United States Supreme Court and then of the court below."

King Iron Bridge & Mfg. Co. *v.* Otoe County, 120 U. S. 225.

In Vannerson *v.* Leverett, 31 Fed. 376-8, Judge Speer held:

"The Circuit Court of the United States is limited in its jurisdiction, and, when it does not obtain, it is an inflexible rule that the judicial power of the United States must not be exerted, even if both parties desire to have it exerted."

Railroad Co. *v.* Swan, 111 U. S. 379, 4 Sup. Ct. Rep. 510;
Cross *v.* DeValle, 1 Wall. 5.

"A judgment of a court without jurisdiction is a *nullity*, and where the failure of the jurisdiction is alleged in the courts of the United States it is never too late for the court to consider the evidence pertinent thereto. Indeed, Congress, by imperative statute, has made this obligatory. If at any time the want of jurisdiction should appear, it is the duty of the court to dismiss the case. Then surely at any time it is the privilege of the party to make it appear, if he can, nor in this case does it waive the absence of jurisdiction to file an answer. The limited jurisdiction of the courts of the United States cannot be enlarged by the action of the parties litigant therein, and, if the want of jurisdiction at any time appears, the court *sua sponte*, will raise the question, whether the parties do or do not.

"The question of jurisdiction of the *subject-matter* may arise in the court in which the action is pending or on appeal, or by action in another court to set aside the judgment, or it may arise in the court in which the proceedings were had, or in some other court. Where the attack is direct, the question whether the court is one of general or of inferior jurisdiction is immaterial. *The question of jurisdiction of the subject-matter may be raised directly, either in the trial court or on appeal, at any stage of the proceedings.*"

Works on Courts and their Jurisdiction, p. 118, citing:
Doctor *v.* Hartman, 74 Ind. 221, 228.
Cooley's Const. Lim., p. 398.

"The question of the jurisdiction of the lower court of the *subject-matter is open to objection in the appellate court for the first time.*"

Works on Courts and their Jurisdiction, p. 118, citing:
Peyser *v.* Murray, 6 Ind. 35.
Doctor *v.* Hartman, 74 Ind. 221.

III.

The record in this case showing on its face that, with the exception of a few islands stated to be in Georgia, the entire property, "including the cotton mill and all the machinery therein or thereto belonging, and all water privileges and riparian rights, etc.," are plainly described as "lying and being in Chambers county, State of Alabama," the Circuit Court of the United States for the Northern District of Georgia was without jurisdiction to entertain so much of the bill filed in this cause as sought to foreclose the mortgage set up against said property, situated in Chambers county, in the State of Alabama, without jurisdiction to decree the sale thereof to be made by its commissioner in the State of Georgia, and without jurisdiction to confirm the sale so made.

This mortgage recites that a part of the property, consisting of certain isolated and detached islands as plainly described, were situated in the State of Georgia, while it then goes on to recite:

"Also, a tract or parcel of land, lying on the *west* side of the Chattahoochee river, *opposite* the above-described islands, bounded on the *east* by said river, beginning at a point on the *west* bank of said river, nearly *opposite* the center of the seven-acre island * * * containing sixty-five and 23 100 (65.23) acres, more or less, *lying and being in Chambers county, State of Alabama*, and being a part of section, etc., * * * *including all tenements and improvements, including the cotton mill and machinery therein or thereto belonging*, and all water privileges and riparian rights now or here-

after owned or enjoyed by said Alabama and Georgia Manufacturing Company."

Part I, pp. 6–7.

From the face of this description in the mortgage, therefore, it is seen that barring the few islands named, this entire cotton mill plant, lands, factory village, tenements, etc., etc., are situated *wholly* whithin the State of *Alabama*. Appellees admit this to be the fact.

It likewise is shown, on the face of the record, that these islands lying "*opposite*" and on the *other* side of the river, are entirely divorced and separated from *all* the remainder of the said lands and cotton mill plant in Alabama, and consequently that portion of said property *claimed* to be in Georgia, on the one hand, and all the remainder of the property so stated to be in Alabama, are, as matter of fact, plainly "*divisible*" or isolated, the one from the other.

In recognition of the fact that this entire cotton mill plant and village, etc., lie wholly within the State of Alabama, charter for the "Galeton Cotton Mills" was procured and the company was organized solely in *Alabama* and not elsewhere.

Part II, pp. 224–7.

"It is an elementary principle of jurisdiction that a court sitting in one State, whether State or Federal, cannot foreclose a mortgage on and decree a sale of land situated in another State." * * * "The courts of one State can have no jurisdiction over persons or property without its territorial limits, and any exertion of their authority beyond those limits would be deemed an illegitimate assumption of power, and be resisted as mere abuse."

Watkins *v.* Holman, 16 Pet. 26.
Boyce *v.* Grundy, 9 Pet. 275.
Northern Indiana R. Co. *v.* Mich. Cent. R. Co., 15 How. 233.
Watts *v.* Waddle, 6 Pet. 389.
Jones on Mortgages, Sec. 1444.
Farmers' L. & T. Co. *v.* Postal Tel. Co., 55 Conn. 334.
Lynde *v.* Columbus C. R. Co., 57 Fed. 993.
Black on Judgments, Vol. 2, Sec. 872.
Rorer on Interstate Law (2d ed.), Ch. XXI, 284 (N. 1), and cases cited.

In Davis *v.* Headley, 7 C. E. Green, 115, the learned Chancellor Zabriskie declared:

"It was a well settled principle of law in the decisions of England and of this country, and acquiesced in by the jurists of all civilized nations, that immovable property is exclusively subject to the laws

and jurisdiction of the courts of the State or nation in which it is located, and that no other laws or courts could affect it.

"The jurisdiction of courts over land is local. Neither State nor Federal courts can reach or confer title, nor sell under a decree those which are situated in a different State from that in which the court sits."

Boyce *v.* Grundy, 9 Pet. 275 *supra.*
Watkins *v.* Holman, 16 Pet. 16.

"And so in the district as to United States Circuit Courts."

Northern Indiana R.R. Co. *v.* Mich. Cent. R.R. Co., 15 How. 233.
Watts *v.* Waddle, 6 Pet. 400.
Rorer on Interstate Law (2d ed.), Ch. XXI, 284 (N. 1), and cases cited thereunder.

"And where a sale is made by virtue of an execution from the United States Court, the State law directing the place of sale governs."

12 Plead. & Pract., 41, citing:
Smith *v.* Cockrell, 6 Wall. 756.
Wayman *v.* Southard, 10 Wheat. 1, and other cases cited.

By statutory enactment in nearly all the States all sales of realty must be held *at the court-house in the county in which the property is situated.*

12 Ency. Plead. & Pract., citing:
Anniston Pipe Works *v.* Williams, 106 Ala. 334.
Longworthy *v.* Featherstone, 65 Ga. 165,

and numerous other cases cited from other States.

IV.

Replying to Contention of Opposing Counsel and Their Reliance Upon Effectiveness of a Decree in personam—Necessity of Ancillary and Auxiliary Bills, in Order to Subject Property Lying in Another State.

Notwithstanding the foregoing unbroken line of authorities, which have been finally crystallized into *horn book law*, and "acquiesced in by the jurists of all civilized nations," as Chancellor Zabriskie well says, it is averred by counsel that said property is indivisible and, therefore, not affected by either State or county lines. If this property has destroyed the divisibility of the States of Alabama and of Georgia, it is certainly greatly to be regretted.

There is no such law as that of the divisibility of property. No text-writer upon the law of real estate or of sales of real property has ever treated upon the subject. Neither Bouvier nor Rapalje's Dictionary of Law gives any definition of the word "divisibility," or of the word "indivisibility," and no digest has such a title. There is a principle in equity and in probate that, where land cannot be divided without injuring the rights of minors, tenants-in-common, or other wards of chancery, or of probate, it will be sold as a whole and not in parcels. But invariably in such cases, where land is situated in different counties and in different States, supplementary ancillary or rather auxiliary proceedings are imperatively required.

There is also a question which arises as to the divisibility of railroad franchises, where railroad corporations have been consolidated by legislative enactment specially providing for the consolidation of said corporation and their franchises into a third corporation in the parent State which creates the original corporation. Where such a consolidated railroad is the owner of a bridge across a navigable stream, which forms the boundary line between two States or countries, the jurisdiction over such stream resting in the Federal Government, and the bridge having to be built under a special act of Congress, such a bridge is exclusively within the jurisdiction of a Federal court, and as to destroy the abutments over which alone the States could exercise jurisdiction would be to destroy the bridge, and the abutments being but incidental to the bridge, the Federal court will treat the property as lying within the Federal jurisdiction. So also courts have held in some States that rolling-stock is real estate. We have the anomaly, therefore, of real estate situated in different States sold on the same day. These decisions are rendered necessary by the peculiar character of railroad property, and apply to no other property. If foreclosure sales were required in all the States they would have to be held at identically the same moment in each State, and evidence would have to be taken as to the exact location of each portion of the rolling-stock at the precise moment of the sale. Even then some train might be crossing a State line at a given moment and not be sold by any State, as it would be impossible to tell precisely how many cars of a moving train are in each State. The Supreme Court of the United States allowed a Federal court to make a sale of the entire property of a railroad corporation, with property in different States, upon the ground of the necessities of the particular case, but even then re-

quired the trustees under the mortgage, who were before the court, to execute the deed.

Muller *v.* Dows, 94 U. S. 449.

The United States Circuit Court of Appeals, in reviewing this authority, on the circuits, have expressly and uniformly held that the master commissioner had no jurisdiction beyond the State line, as he was merely process, and that the validity of the sale rested upon the deed of the trustees, having the effect of a decree *in personam*. This also is the view which every court has adopted in considering this decision, not only on the circuit but including the repeated ratifications, in later decisions, by the Supreme Court of the United States itself.

Railroad corporations, as *quasi* public corporations, have privileges and responsibilities not possessed by purely private corporations. The sovereign power of eminent domain vests in railroad corporations by reason of their public nature, even though it was argued by some of the ablest lawyers and held by some of the best courts, in the early days of railroad enterprises, that eminent domain, being an attribute of sovereignty, could not be delegated. It is now universally agreed that it can be so delegated, but the reason is only found in the fact of the public nature of these corporations.

In Mercantile Trust Co. *v.* Kanawha and Ohio Ry. Co., 39 Fed. 337, Mr. Justice Harlan, after reviewing exhaustively the facts, concluded in the following strong words:

"It might be well if Congress would so enlarge and regulate the jurisdiction of the courts of the United States as to enable a circuit court, in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad, to take actual possession by its officers of the entire line, and of all the mortgaged property, wherever situated, and administer it for all concerned; preserving in that mode the unity of the road, and the just rights of mortgagor, mortgagees, and creditors, as well as those of the general public interested in commerce among the States. *But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely.*"

The rule recognizing the absolute regularity and necessity for the filing of ancillary and auxiliary bills in order to reach and subject property—especially railroad property—lying in other States, has been carefully laid down, under petition from the circuit by Justices Field, Harlan, Brewer and Brown, in the important case of

the Farmers' Loan and Trust Co. *v.* Northern Pacific Railroad Co., 69 Fed. 871, and 72 Fed. 26.

To same effect, see:

Dillon *v.* Oregon S. L. and U. N. Ry. Co., 66 Fed. 622, and cases cited.

Central Trust Co. *v.* Wabash, St. Louis and P. Ry. Co., 29 Fed. 620.

Reynolds *v.* Stockton, 140 U. S. 254, 272.

Wilmer *v.* Atlanta and Richmond Air Line Ry. Co., 2 Woods, 447; 30 Fed. cases No. 17,776.

A very thorough illustration of the proper course to be pursued, where property is in two States, will be found in the case of Wilmer *v.* Atlanta and Richmond Air Line Railway Company. In that case the existence of the two companies of different States was recognized, and the two companies appeared and were made parties. Furthermore, in regard to the property outside of the State, the court expressly say:

"We are not asked to foreclose the mortgage. We are not asked to confer on the trustees any power they do not already possess, but simply to tell them what are their powers under their deed."

The court also say: "The complainants may be required to file ancillary bills in other States," and the decree was that the trustees were directed to sell the road at Atlanta, Georgia.

Wilmer *v.* Atlanta and Richmond Air Line Railway Co., 2 Woods, 447, 455, 456, and 457.

In all railroad foreclosures recently had in the jurisdiction of the Circuit Court of the United States for the Northern District of Georgia, ancillary bills were filed in every State through which the roads ran; decrees were taken on each of these ancillary bills, and the mortgagor railroad companies were required to execute deeds, as well as the Master Commissioner, and the purchaser was given the right to demand a deed from the trustee foreclosing the mortgage.

This was true in the Central railroad foreclosure, Richmond and Danville foreclosure, Georgia Pacific foreclosure, Savannah and Western foreclosure, Marietta and North Georgia foreclosure, and Chattanooga, Rome and Columbus foreclosure, and in the case of the Eagle and Phenix Manufacturing Company foreclosure.

In the case at bar, no such ancillary or auxiliary bill was ever filed in Alabama to subject the property concededly lying within

that State, which was the *whole* cotton mill plant (except, possibly, a few worthless islands).

In this connection, respecting the jurisdiction of the Circuit Court to convey lands in another State, the Circuit Court of Appeals, Fifth Circuit, in the case of Guarantee Trust and Safe Deposit Co. *v.* Delta and Pine Land Co., 104 Fed. p. 5 (May 30, 1900), held as follows:

"While a Federal Court of Equity may compel a conveyance of lands in another State by a decree *in personam*, against a party who holds the title, *it has no jurisdiction to itself to transfer the title to such lands by a sale and conveyance made through the master or commissioner.*"

* * * * * * * *

In the opinion, it is said:

"A writ of assistance, issued by the court in Tennessee to put the purchaser, at the sale made by the master, in possession of the property, *would be wholly inoperative, because such process could have no extra-territorial effect.*"

Toland *v.* Sprague, 12 Pet. 300; 9 L. W. 1093.
Picquit *v.* Swan, 5 Mason, 40; Fed. Cases, No. 11, 134.
Ex parte Graham, 3 Wash. C. C. 456; Fed. Cases, No. 688.
Walker *v.* Lea, C. C. 47; Fed. Cases, No. 645.

See brief of John T. Morgan filed on *certiorari*, pp. 78–89.

See also—

Pennoyer *v.* Neff, 95 U. S. 714; L. W. 565.

See brief of John T. Morgan, Welles, Bennett & Welles, and John M. Chilton, filed under application for writ of prohibition, mandamus, etc., pp. 6 to 14.

V.

In order to determine whether a controversy is between citizens of different States, the court will arrange the parties to the record in accordance with their relation to the controversy and not according to the views of the pleader.

Ketchum v. *R.R. Co.*, 101 *U. S.* 289, 298.
Old Colony Trust Co. v. *Atlanta Ry. Co.*, 100 *Fed.* 798.
Boston, etc., Co. v. *Racine*, 97 *Fed.* 817.
Pittsburg, etc., R.R. Co. v. *B. & O. R.R. Co.*, 61 *Fed.* 705.
First Nat'l Bank of Chattanooga v. *Radford Trust Co.*, 80 *Fed.* 569.

In this case there were three trustees of the mortgage being foreclosed: J. J. Robinson, W. C. Yancey and W. T. Huguley. Yancey was dead, and no successor had been named for him. Robinson was a citizen of Alabama, Huguley a citizen of Georgia. The Alabama and Georgia Manufacturing Company was two distinct corporations of the same name, with two charters, separate charters having been granted, and no consolidation having ever been effected. The Huguley Manufacturing Company was likewise a corporation created under separate charter in each of the States of Georgia and Alabama, and does not appear to have ever been consolidated. As pointed out, *supra*, both the Alabama corporations were *first* chartered and organized, and, because certain islands were supposed to lie on the Georgia side, charters were *subsequently* taken out in Georgia.

No decree was ever entered against the Huguley Manufacturing Company, and as owner of the equity of redemption, it was never accorded its day in court in which to redeem.

Why should Huguley be ruled out as a trustee? Why should he not be classed as a party complainant?

Pacific Railroad Co. v. *Ketchum*, 101 *U. S.* 289, 298.

If, therefore, Huguley (a citizen of Georgia) was a necessary complainant, or should be so classified on the record, jurisdiction fails.

VI.

If there be other essential parties to the controversy who have been omitted, whose citizenship would defeat the jurisdiction if they are necessary parties, whose rights must be affected by the decree, the court cannot proceed in their absence, but must dismiss the bill.

The citizenship of none of the bondholders is made to appear in the bill, and the holders of $22,000.00 of bonds are shown on face of the bill to have accepted their interest, waived the default, and openly repudiated the action of Robinson, trustee, in bringing his bill to foreclose. In one of the first opinions ever rendered in this suit by Judge Newman, viz., upon "taxation of counsel fees, etc.," he said:

"This bill was filed because of non-payment of interest, which, under the contract, gave the right to foreclose, and a serious question was made by the pleadings and the proof in the case whether or not the right to foreclose existed at the time the bill was filed. * * * No right can be claimed here in this respect because of any liability

incurred by the trustee in the performance of his duties, because it appears from the evidence that the trustee required an agreement that he should not be responsible for counsel fees before he would *allow the use of his name* in the suit; and the case has really more the appearance of the holders of these obligations proceeding through the trustee, *as a mere nominal party*, than the act of a trustee in the discharge of the duty incumbent upon him by virtue of a trust which he had assumed and agreed to carry out, etc."

Part I, pp. 158-9.

It would seem from this adjudication that *all* these bondholders should have been made parties to this bill and not merely *Robinson*, the "*mere nominal* party," and that these majority as well as the minority bondholders were therefore indispensable parties, and had their citizenship been made to appear, or had they been joined as parties, the jurisdiction of the Circuit Court would have failed. It is noteworthy that the holders of the other majority bonds ($43,000) deserted Lanier, their former agent and trustee, and refused to permit their bonds used in payment of his bid at the second pretended sale of May 6, 1896.

Part III, p. 68.

If the Alabama and Georgia Manufacturing Company of Alabama, or the Huguley Manufacturing Company of Alabama, are necessary parties to the bill for a decree, the jurisdiction fails.

California v. *Southern Pacific Co.*, 157 *U. S.* 229.

Where parties are necessary and cannot be made without ousting the jurisdiction, the bill should be dismissed without prejudice.

Barney v. *Baltimore*, 6 *Wall.* 280.

Railroad Co. v. *Railroad Co.*, 15 *How.* 233.

Railroad Co. v. *Trust Co.*, 174 *U. S.* 552.

If the allegation of citizenship be sufficient, but the court subsequently discover that it is untrue, or it is discovered in the Appellate Court, each court on discovering the untruth should dismiss said case.

Morris v. *Gilmer*, 129 *U. S.* 315, 325.

Cameron v. *Hodges*, 127 *U. S.* 322, 325.

Nashua R.R. Co. v. *Lowell R.R. Co.*, 136 *U. S.* 356, 374.

Anderson v. *Wall.* 138 *U. S.* 121.

See brief of John T. Morgan on application for *certiorari*, pp. 89-95.

See brief of Morgan, Welles, Bennett & Welles, and Chilton on application for prohibition, mandamus, etc., pp. 19-28.

VII.

Not only must a court have jurisdiction of the parties and of the cause of action, but the judgment rendered must not transcend the power of the jurisdiction.

In this case the court below foreclosed this mortgage for the *entire* amount of the debt, when only a *part* was due. The Appellate Court reversed this decree and annulled the sale on the express grounds that there had been no ascertainment as to the amount claimed to be in default and those not in default, and because the property had been foreclosed as to *all*, whereas some of the bondholders ($22,000 in amount) had waived the default by accepting their interest. (Fosdick's Case.)

Despite this express decision of the Court of Appeals, the lower court then rendered a second decree adjudging *all* of the bonds which had not waived default due with *all* interest thereon.

Part II, pp. 281 and 288.

No credit was given the defendant for any payment which had reached these bondholders through any cash paid on the sale which had been set aside.

These very bondholders whose bonds were declared due had been in possession of the mortgaged property from the time of the first sale.

The court held they ought to be treated as mortgagees in possession, and the rents received applied to pay the mortgaged debt.

Part III, p. 60.

But the court, although ordering an accounting to ascertain what *these bondholders* whose debts were due had received from the rents of the mortgaged premises, refused to credit that amount so received (thirty-five thousand eight hundred and fifty-seven and 54 100 ($35,857.54) dollars) on the amount due these bondholders, although these bondholders then had it as *issues and rents* of the mortgaged property, and decreed that the defendant should pay the full face of the bonds then due with interest to November 1, 1894, or sixty-two thousand and five and 92 100 ($62,005.92) dollars, with eight (8%) per cent. interest from November 1, 1894, instead of applying this credit and requiring only the amount due on these bonds, *i. e.* ($62,005.92 less $35,857.54) twenty-six thousand one hundred and forty-eight and 38/100 ($26,148.38) dollars with

interest, to be paid to prevent foreclosure. And this, assuming that the master's report, and the decree of the Circuit Court confirming same, awarding only this reduced sum—representing merely patent errors shown on face of *forged books* and admitted by the accounting parties—be all that the Huguley Company may be ultimately awarded up to that date. Whereas, the Huguley Company insisted and now insists that they had established, by numerous witnesses and by incontestable proof, the sum of $228,000.00 as due them up to May 6, 1896. (See assignments of errors, Nos. XII to XVI.) If the court was right that these bondholders were entitled to treat these rents as collections from the mortgaged estate on account of the debt, then the court transcended its power in requiring the entire face of the due bonds and coupons, without credit of these rents, to be paid, and in selling for a default in such payment.

The ascertainment and fixing of the amount due on the mortgage, and giving opportunity to pay same, is essential to the right and power of the court to order a sale of the mortgaged property.

"But as in cases of strict foreclosure so in cases of sale, the equity of the mortgagor as against the mortgagee is not exhausted until sale is actually confirmed; for if at any time prior he should bring into court, for the mortgagee, the amount of the debt, interest, and costs, he will be allowed to redeem.

"It is the deed made to the purchaser actually transferring the title of the parties to the suit that terminates the mortgagor's equity of redemption. *Brine* v. *Insurance Company*, 96 *U. S.* 627.

"It is obvious that the finding of the amount due, for non-payment of which, according to the terms of the decree, the mortgaged property is ordered to be sold, is the foundation of the right of the mortgagee further to proceed, and a substantial error in that finding must, on appeal, vitiate all subsequent proceedings. Unlike a calculable error in the amount of a personal judgment which may be cured by a *remittitur*, it is otherwise incurable; for, as it is an illegal exaction, made as a condition for preserving the rights of the mortgagor in his estate, and, if executed, depriving him wrongfully of them, it propagates itself through all subsequent stages of the cause. The right to redeem is a favorite equity, and will not be taken away except upon a strict compliance with the steps necessary to divest it. *Bigler* v. *Waller*, 14 *Wall.* 297; *Shillaber* v. *Robinson*, 97 *U. S.* 68. In *Clark* v. *Reyburn*, 8 Wall. 318, a decree of strict foreclosure, which contained no finding, either of the fact or amount of the alleged indebtedness, and gave no time within which to pay or redeem, was reversed on these grounds, although the bill was taken *pro confesso* as to the parties having the entire beneficial interest, and contained an averment of the precise amount of the mortgage debt then due. The same consequences undoubtedly

would have followed if it had been a decree of foreclosure and sale, instead of a strict foreclosure; and *the error is as vital where a larger amount than is actually due is ordered to be paid*, as where there is a failure to find what amount is due."

Chicago, etc., R.R. Co. v. Fosdick, 106 *U. S.* 47, 71.

In this case when the decree of March 10, 1895, for foreclosure was made, defendants resisted upon the ground that an accounting of the bondholders as mortgagees in possession should be first had, and the amounts received on the mortgage debt from the rents, issues and profits of the mortgaged estate should be applied in order to truly fix the amount which they were indebted. This prayer the court denied, and it is one of the errors which was complained of in the Circuit Court of Appeals.

The property was sold, and was bid in by Lanier as representing the *bondholders*. Lanier did *not* comply with the order of sale and confirmation, and it was not until October 15, 1898, that the decree of confirmation upon which a deed was executed was finally made. During the intermediate time, to wit, not only for the three (3) years and eight (8) months from September 6, 1892, to May 6, 1896, but the two (2) years and five (5) months, viz, from May 6, 1896, to October 15, 1898, these very bondholders, the mortgagee, and those claiming under them, had been receiving the rents, issues and profits of these premises. Such rents, issues and profits belonged to the defendant, the owner of the equity of redemption, and should have been applied by them to the payment of the mortgage debt.

Clason v. *Corley*, 5 *Sandf.* 447.

Astor v. *Turner*, 11 *Paige*, 436.

Mitchell v. *Bartlett*, 53 *Barb.* 319.

"Neither in law nor in equity is the purchaser under the foreclosure entitled to the earnings of the property since the decree of confirmation, because, among other things, he has persistently delayed complying with his bid."

Boyle v. *Trust Co.*, 32 *C. C. A.* 142.

This latter case, and one involving millions, is a precedent representing an adjudication by the Circuit Court of Appeals for the fifth circuit only a few months before the case at bar was decided by the same court. And yet the Court of Appeals ignored our assignments of error covering these material equities.

"It is the deed made to the purchaser actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption."

Railroad Co. v. *Fosdick*, 106 *U. S.* 47, 71.

The report of the master was in, showing that the mortgage creditor had received up to May 6, 1896, thirty-five thousand eight hundred and fifty-seven and 54/100 ($35,857.54) dollars on his mortgage debt.

Part III, p. 37 and p. 53.

Hence only twenty-six thousand one hundred and forty-eight and 38/100 ($26,148.38) dollars, with interest, remained to be paid at the time the decree for sale was made. The court should, therefore, before confirming this sale have required the purchaser to account not only for the profits received during the three years and eight months up to May 6, 1896, but for the additional two years and five months from May 6, 1896, to October 15, 1898 (in all exceeding six years of illegal tenure under an annulled sale); which would have far more than extinguished the balance of the debt, and if such was the case should have declined the confirmation upon the ground that the debt had been paid before deed made.

If it did not entirely extinguish the debt it surely would have reduced it to the point where the mortgagor could easily have paid off the rest and prevented the wiping out of his equity.

The courts will always strive to prevent a forfeiture, and to relieve a mortgagor from the loss of his property.

Hill v. *McCall*, 13 *Iowa*, 467.

Weiner v. *Heintz*, 17 *Ill.* 259.

Hamberger v. *Boyd*, 18 *Ind.* 420.

Brown v. *Frost. Hoffm.* (*N. Y.*) 41.

In this case, therefore, when this decree of sale was rendered, the court transcended its power by decreeing that the mortgagee should pay a sum which the record showed was subject to a deduction for payments received by the mortgagee from the rents, issues, and profits of the estate. When the sale was confirmed it also further transcended its power by confirming it without ascertaining if these rents, to wit, from September 6, 1892, to May 6, 1896, with the further rents, viz. from May 6, 1896, to October 15, 1898, aggregating several hundred thousand dollars, did not more than extinguish the mortgage debt and with it the right of the defaulting purchaser to a confirmation of his sale and a deed two years and five months after the property was bid in, and *over six years from the date of the first sale, which had been reversed, annulled, and vitiated.*

A decree for sale of property for default, in a payment where the sum demanded transcends what the record shows is the debt in default, is beyond the power of the jurisdiction of the court, and the sale thereunder is void.

"The doctrine invoked by counsel that, where a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but, like all general propositions, is subject to many qualifications in its application. * * * The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

Windsor v. *McVeigh*, 93 *U. S.* 274, 282–3.

No effective sale, conveyance or confirmation under any view against the Alabama & Georgia Manufacturing Company. It had expired before the same occurred.

Charter expired March 21, 1896.

West End & Atlanta Street Ry. Co. *v.* Atlanta Street R. Co., 49 Ga. 151, 153.

Suit against *it* fell on such death. Subsequent action a nullity.

Pendleton *v.* Russell, 144 U. S. 640, 644.

Logan *v.* Western & Atlantic Ry. Co., 87 Ga. 534.

In this case the decree is wholly against Alabama and Georgia Manufacturing Company of *Georgia*.

Part 1, pp. 172 and 175.

Therefore it was an essential party, and as to it the sale and all proceedings are void.

Huguley Manufacturing Company not decreed against.

No *res adjudicata*, even where jurisdiction of case pending, as to those not parties.

VIII.

Both of the sales in question, viz., September 6, 1892, *and May* 6, 1896, *were absolutely void, because, at the time that the Circuit Court of the United States for the Northern District of Georgia assumed jurisdiction to entertain the bill filed by Robinson, trustee, and at the time the respective decrees of sale were rendered, and at the time of said sales thereunder, the property sold or sought to be sold, together with a large amount of cash and other "quick assets"* ($20,000 *in amount*) *were in the possession (in custodia legis) and under the protection and control of the State Chancery Court of*

Troup County, Georgia, through its receiver, H. C. Fisher. Therefore the Federal court was without jurisdiction to entertain said bill or to decree any sale thereunder.

The record in this cause (Part I, pp. 19, 33, 43, 61–2, 81, 164), shows that, in 1888, under a bill filed in the State chancery court of Troup County, Georgia, for an accounting, and under a cross-bill filed by W. H. Huguley & Co., bankers, H. C. Fisher was appointed receiver by said court to whom was turned over by Huguley the factory property and $40,000.00 of cash and other quick assets; that concurrently therewith, or soon thereafter, it not then being conceivable that this great property could be brought to sale under the bonds, and with an eye singly to averting such a possibility, and with the knowledge and consent of both Robinson and Lanier, who were stockholders and directors of the Alabama and Georgia Manufacturing Company, by consent of all parties, the following decretal order was passed by the judge of the superior (chancery) court of Troup County, Georgia, under date of May 22, 1889:

"*Said Fisher, receiver, shall promptly pay the past due interest and the interest to accrue, when due, on the first mortgage bonds of said corporation out of any funds he may have while he remains in office.*" (Part II, p. 142.)

The evidence on the face of the record shows that, under the cross-bill filed by W. H. Huguley & Co., the property was brought to sale on January 6, 1890, and the cotton-mill plant proper was bought in by them. The testimony of W. T. Huguley (answer to Interogatory 9) is as follows:

"Interrogatory 9. The Alabama and Georgia Manufacturing Company did have interest in said litigation as principal defendant. All its interest in *the plant only*, was sold at the receiver's sale at Hamilton, but this by no means exhausted all the assets of the company. At the time of the sale of this realty, the receiver of the State court still held in his possession a large amount of supplies and findings, and also cash and other 'Quick Assets,' valued at about $20,000, all of which were available to meet the interest on the first Mortgage Bonds in conformity with the express order of the State court of May 22, 1889, wherein it was specially enjoined on said receiver to pay promptly 'out of any funds of the corporation he may have, so long as he remains in office,' the interest on said bonds.

"Suffice it, the receiver is still 'in office' and was 'in office' on January 1, 1891, and on that date *had ample cash funds with which to have promptly paid the interest had due demand been made upon him.*

"Until he shall have been discharged he is still the legal representative of the State court and charged with certain duties thereunder, and the corporation not defunct."

The record further shows that said Fisher, receiver, had an office in West Point, Georgia (admission of L. Lanier, answer to interrogatory 3, Part I, page 65), that he had by the express consent of the bondholders, adopted the Atlanta National Bank as the substitute place of payment of the interest coupons, which either directly or through its sub-agents, W. C. and L. Lanier, paid the interest throughout the tenure of said receiver up to the date of the attempted technical default.

Under this state of facts, appellants now insist that as this property, including plant, as well as cash and quick assets are still under the protection and control (*in gremio legis*) of the said Georgia State Chancery Court, which had the first and original jurisdiction to administer its affairs, and that this jurisdiction of the State court was, at the very date that the Circuit Court of the United States, for the Northern District of Georgia, undertook to entertain the bill filed by Robinson, being retained and the receiver continued in office for the express purpose of paying this coupon interest out of his cash in hand and for protecting his said trust under the aforementioned imperative mandate. Therefore said Robinson and Lanier could not legally invoke the aid of the Circuit Court of the United States for the Northern District of Georgia to wreck this valuable property by precipitating a technical default and foreclosure, and they were in contempt of the said Georgia State court in taking such step.

There can be no question, also, that, pending the continuance of the State court's jurisdiction over the property and over its assets of every kind, and so long as its receiver was being kept in office undismissed, under a heavy bond for the faithful performance of its orders, and particularly its injunction to pay "the interest to accrue, when due on the first mortgage bonds of said corporation, out of any funds he may have while he remains in office," then the jurisdiction assumed by the Federal court was wholly unwarranted and illegal, and all its acts and decrees not merely *voidable* but absolutely *void*.

This was the exact question decided in the case of Wiswall *v.* Sampson, 14 How. 52. In that case, while real estate was held by a receiver it was sold by a marshal, and in pursuance of the writ of a Circuit Court of the United States, commanding him to execute its judgment by a sale of the property of the defendant in an

action at law pending in the Circuit Court. The opinion of the Supreme Court contains the following passages:

"A party, therefore, holding a judgment which is a prior lien upon the property *the same as a mortgage*, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances whether it is an existing unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly.

* * * * * * * *

"As we have already said, it is sufficient, for the disposition of this case, to hold, that while the estate is in the custody of the court, *as a fund* to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise, without the leave of the court for that purpose. And upon this ground we hold that the sale by the marshal on the two judgments was illegal and void, and passed no title to the purchaser."

The rule laid down in the case of *Wiswall* v. *Sampson*, that where property is in the possession of a receiver duly appointed by a court of chancery it is in the custody of the court, and no valid sale thereof can be made without first obtaining for that purpose the authority of the court which appointed the receiver—has been adhered to by this court from the time that decision was rendered in December, 1852, until the present time.

See—

Barton *v.* Barbour, 104 U. S. 126, 129.

Krippendorf *v.* Hide, 110 U. S. 276.

In re Tyler, petitioner, 149 U. S. 164, 181.

Pittsburg, etc., Railway *v.* Loan and Trust Co., 172 U. S. 493, 513.

See also decision of Mr. Justice Ma[illegible]s in Heidritter *v.* Elizabeth Oil Cloth Co., 112 U. S. 294, and cases cited.

2d Daniell's Ch. Pl. and Prac. 1431, 1433 (3d Amer. from 3d Eng. ed.)

IX.

GENERAL REVIEW OF CASE, SHOWING THAT ERROR HAS INTERVENED.

Restitution Should have been Promptly Made.

After the mandate of the Circuit Court of Appeals, reversing and annulling the decree of foreclosure and remanding the case to be pro-

ceeded with according to the views expressed in its opinion, holding, among other things, that the error in said reversed decree was so vital as to "vitiate all subsequent proceedings," had been filed in the Circuit Court, and it appeared on the face of the record that the complaining bondholders themselves had purchased said property at the sale under the reversed decree, it became the duty of the Circuit Court to order restitution of the factory property to the Huguley Manufacturing Company, and that without imposition upon it, as condition precedent to regaining possession, the payment into the registry of the court the sum of ten thousand dollars ($10,000.00), claimed to have been paid "into court" on the day of the sale, but no part of which could legally or equitably be taxed against said property, as evidenced by the lower court itself ultimately charging the whole amount "as between the bondholders themselves."

The Circuit Court of Appeals erred in approving this condition as a precedent to restitution.

The bondholders having purchased under a decree of foreclosure, a reversal of that decree entitled the parties against whom it was rendered to be restored to the *status* which they had occupied before it was rendered and executed. Having ousted the Huguley Manufacturing Company of the possession which it had lawfully acquired as the owner of the equity of redemption, it was the duty of the party who had thus obtained possession to make restoration and restitution, and this should have been required before permitting such party to proceed further with his case. It would be very unjust, as was said in *ex parte* Walter Bros., 89 Ala. 239, to permit a party, who had thus acquired possession, to make use of the vantage ground thus wrongfully obtained, thus realizing in advance the fruits of the litigation to which he might only be entitled at its conclusion. It was said in the case cited *supra*:

"We can conceive of no case in which a party, who pays money on a decree which is subsequently reversed, is not entitled to have restitution of what he has paid, and to be reinstated in the position, and to all the rights he had prior to the rendition of the erroneous decree. It is not material what those rights were, or would probably, or even certainly, and necessarily, be determined to be, in the further progress of the litigation. He is entitled to have his final equities adjudicated while he yet occupies whatever vantage ground was his in the inception of the contest, and from that standpoint to invoke the judgment of the law on the issues he presents. When he asks, after the reversal of a decree which has erroneously adjudged his rights and disturbed his relations in the case, to have

his original *status* restored, it is no answer to his petition to say that, on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution.

"To so hold would be to pre-judge the case, to decide in advance of the submission of the issues on pleading and proof that the party, who has been put at a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the cause. On the other hand, we are unable to see any predicate for the claim of the other party to retain what, confessedly, he has wrongfully received. He had no right to the money involved in the litigation, in contemplation of law, until there should be a correct determination of the matters in dispute, however clear his rights may have been in point of fact. He, therefore, proceeds with the cause, having an undue advantage of his adversary, and is in fact in the attitude of having gained what he claimed before his right to it had or could have been determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand, and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties."

It is in recognition of this plain and just principle that it is said that every mandate from a higher to a lower court contains by inference a direction to make restitution.

In the case of The United States *v.* The Bank of Washington, 6 Pet. 19, it is held as follows:

"The judgment in form is not only that the judgment of the court below is reversed, but that it is considered that the defendant be restored to all the things he has lost on account of the judgment aforesaid."

Again, in Foster's Fed. Prac., 2d ed., § 495, p. 1093:

"Where a judgment or decree which is reversed has been executed pending the writ of error or appeal, the mandate should include a direction to the court below to compel restitution."

Citing: The Rachel *v.* U. S., 6 Branch, 329.
Bank of U. S. *v.* Bank of Washington, 6 Pet. 8.
Morris Cotton, 3 Wall. 507.
Ex parte Morris, 9 Wall. 65.
Northwestern Fuel Co. *v.* Brock, 139 U. S. 216.

In Perrin *v.* Lepper, 56 Mich. 361, Judge Cooley also said:

"It would be a serious reproach to the law if the litigant could be thus summarily divested of his legal possession and excluded

from it pending what might be a long litigation, with no redress whatever except in future restoration, when perhaps it had been demonstrated that the original exclusion was unwarranted."

It is too well settled for controversy that a reversal of a decree under which a party to a suit has acquired title or possession annuls the title and right of possession, and entitles the party who has been dispossessed to *prompt* restitution.

Herman on Executions, Ch. 608.
Freeman on Judgments, Secs. 481, 482.
Walker's American Law, p. 496.
Beach on Modern Equity Practice, Sec. 993.
Galpin *v.* Page, 18 Wall. 373.

Mr. Freeman (*supra*, Sec. 481), thus states the general rule:

"The reversal of a judgment by any competent authority restores the litigants to the same condition in which they were prior to its rendition. The judgment reversed becomes mere waste paper, and the parties to it are allowed to proceed in the court below to obtain a 'final determination of their rights' in the same manner and to the same extent as if their cause had never been heard or decided by any court. Neither, in the subsequent prosecution of the cause, can suffer detriment nor receive assistance from the former adjudication."

In Sec. 482, the learned author also says:

"Upon the reversal of its judgment against him, the appellant is entitled to the restitution from the respondent of all the advantages acquired by the latter by virtue of the erroneous judgment. The successful appellant is entitled to a restitution of everything still in possession of his adversary *in specie*; not the *value* but the *thing*. * * * If the plaintiff purchase the property of the defendant at a sale under a judgment or decree, his title will be defeated by a subsequent reversal. * * * The right to restitution cannot in any case be resisted on the ground that on final hearing of the cause it will appear that the party of whom restitution is sought is entitled to the property of which he got possession, or of the money which he received under the reversed judgment."

That this is the law of Georgia is shown by Ragan *v.* Cuyler, 24 Ga., p. 400.

Immediately after this cause was first reversed, The Hagueley Manufacturing Company, which had been turned out of possession, filed its petition in which it informed the court below of the fact of the reversal, and that the complaining bondholders, who

had purchased at their own sale, were still in possession. Its prayer was that restitution be made, and that the bondholders account for the rents and profits, etc., during the time they had been in possession—then about ten months.

Part II, p. 1.

When the reason of the rule, which requires restitution to be made is considered, and when it is remembered that *promptness* in the redress, even to making it a condition to a right further to proceed, is a cardinal feature of the redress, it must strike this court that the Huguley Manufacturing Company, which, as the owner of the equity of redemption, had succeeded to all the rights of the mortgagor, has not only been compelled to press this litigation more than ten years, but to do so under all the disadvantages of being out of possession, with its consequent deprivation of means, while the bondholders and the West Point Manufacturing Company, through its "dummy," holding under them, confessedly in possession in their own wrong, have been permitted to retain it for this long period of time, with the consequent advantage of a receipt of the rents and profits.

Part II, pp. 89–91 and 231–232.

The court decreed it was entitled to both restitution and accounting, but required as a condition precedent to relief in either aspect that the Huguley Manufacturing Company refund to the purchasing bondholders, or to parties holding under them, some ten thousand dollars ($10,000.00), which it was claimed they had paid "into court" under the decree on their purchase, and which had been expended in part in paying the costs of the proceeding under the decree which had been reversed, which had been awarded *in favor of* the Huguley Manufacturing Company ($1,002.50), including fees of complainants' solicitors ($2,600.00), the taxation of which the Circuit Court had already held could not be made against the Huguley Company, and fee awarded Robinson, trustee ($500.00), and the remainder of which ($5,897.50) had been expended in a dividend paid upon certain bonds, the holders of which had declined to join in the purchase—a transaction purely personal between the owners of the bonds and the parties advancing the money, and who became subrogated to the equity represented by said dividend. These respective sums made up the $10,000.00, the prepayment of which as a condition precedent to regaining possession of its property and being allowed to proceed with the accounting the Circuit Court imposed upon the Huguley Manufacturing Company.

In the case at bar the lower court ordered restitution, but under an illegal, inequitable and improper condition precedent, *i. e.*, that the Huguley Manufacturing Company, the owner of the property, who was not personally bound for the complainants' debts, and against whom there was no existing decree, should first pay "into court" the ten thousand dollars claimed to have been paid in by the purchasing complainants as part of the price of their bid.

Part II, p. 239.

We know of no case in the books, except this case, where any such condition to restitution was imposed. In every judicial sale, where the plaintiff in execution buys, the price of the sale is paid in by him, and the amount, less costs, is applied to the payment of his debt. In no instance, barring this case, has any court ever held that where the decree under which the sale is made is reversed and it is called upon to do "prompt justice," the defendant against whom there is no judgment, or order or decree to pay money, cannot recover his property from the plaintiff until he pay back in whole or in part the money paid in by plaintiff, which has gone back to plaintiff, or has been disbursed in paying the costs of the void sale.

If the part of the fund so paid in on the void sale had been applied to the payment of past due prior liens bearing upon the property sold, and the remedy by subrogation of the purchaser thereto had been lost or made ineffectual, then it would be proper and right for a court of equity to impose the prepayment of such debts of the owner as a condition to restitution.

But in this case no such equity presented itself.

The defendants were in no manner bound to pay a single dollar of the debts for which the $10,000 were disbursed.

This fund was disbursed, as appears by the report of the commissioner (Rec., p. 41), as follows:

Fees of trustee's solicitors	$2,600 00
To Robinson, trustee	500 00
To court costs	230 50
To special commissioner's fee	400 00
To advertising, etc	370 00
	$4,100 50

And this $4,100.50 was all that was actually paid "into court." The balance ($5,899.50) was paid in cash as a dividend on bonds owned by Mrs. S. H. Huguley and by D. Jannopoulo, and paid to their attorney direct. While the payment was "in a court-house," it

is denied that it was a payment "into court." And it is insisted that the parties so paying this $5,899.50, became subrogated to this extent to the equity held by the said individual bondholders, and that it was a transaction purely personal between them as individuals.

As shown by the final decree (Rec., pp. 52 and 57), these identical bonds were excluded from the benefits of foreclosure and the principal thereof was declared not in default.

Part II, pp. 283 and 286.

In the same final decree (Rec., p. 138), full provision is made for the protection of the payers of the dividend on the excluded bonds, viz:

"In making distribution, any bonds on which a percentage has been paid in cash to former holders, and credited thereon for money paid into court under the first sale of said property, shall be controlled by the person or persons so paying the money into court for the purpose of reimbursement of such money so paid, and the person so paying said money shall receive all dividends that such bonds may be entitled to until they are reimbursed the amount so credited on said bonds and interest thereon at 8 per cent. per annum. And the original holders of said bonds are not entitled to receive any percentage on said bonds until after the amount so advanced is repaid to the person so advancing it."

Part III, p. 66.

This disposes of the larger item of the $10,000 "condition precedent."

As to the next largest item—attorneys' fees—($2,600), before this petition for restitution had ever been filed, the very court which refused it, had in this very case and in its very first opinion rendered, decided that defendants were *not* liable for solicitors' fees. Its language upon this point, in sustaining the demurrer of defendants to a petition of Robinson, trustee, asking $1,000 for himself and $7,500 of fees for his solicitors, was, in effect, that to tax such fees against the property would be a fraud upon the rights of the Huguley Manufacturing Company. (Part I, pp. 158–9.)

As to the next item ($1,000.00), representing the actual costs proper, the Huguley Manufacturing Company, upon succeeding in reversing the case on first appeal, had been awarded the "costs" as matter of course, and certainly no part of this item could be made a "condition precedent."

Lastly, and in fullest recognition of the original contention on

the part of defendants that no part of said $10,000.00 was taxable against them, the same Circuit Court, in the final decree in this case (Rec., p. 137) adjudged that identically the above costs, fees, etc., going to make up the "condition precedent," plus $2.00 additional, "paid out under the first sale of the property, and which sale was set aside," should be paid by the *complaining bondholders* "*as between themselves.*"

Part III, p. 65.

And yet, because the Huguley Manufacturing Company refused to meet this most inequitable and illegal "condition precedent"—admittedly wrongly charged at its door—it has been deprived of possession of its great manufacturing property and the rents and profits thereof for now ten years.

The purchasers went into possession of this property on September 6, 1892.

The judgment was reversed and the sale annulled on May 30, 1893.

The application for restitution of the property and for an accounting for rents and profits was made July 10, 1893. (Part II, p. 1.)

This application was renewed and refused September 22, 1894 (Part II, pp. 239–240), after the purchasers had been in possession for more than two years, of which period sixteen months had elapsed since the reversal of the decree.

The court even refused to order a reference to take an accounting of the rents and profits during this clearly illegal detention, except upon the condition that the defendants first pay in the $10,000.00 (Part II, p. 242). And even after it had entered this order the court cancelled it on the same day, on the ground that the "subject-matter was covered by other orders" (Part II, p. 244). So that the defendants were left out of possession of their property, with no judgment or decree against them, face to face with a coming foreclosure, and even denied the right to have an accounting before the same master, who was taking an account of the mortgage debt, of the rents and profits due by the very persons to whom the mortgage debt was due.

The only relief obtained in the Circuit Court of Appeals from these manifest errors and injustices was an affirmance, with the suggestion in the opinion that defendants were entitled to an accounting.

Alabama & Georgia Mfg. Co. *v.* Robinson, 72 Fed. Rep., p. 709.

In this connection, it becomes interesting to reproduce the views of Judge Newman of the Circuit Court, as expressed in his opinion in Part 2, pp. 236, and 238–9.

"The authorities are somewhat in conflict as to how far a sale, by virtue of a judgment which is subsequently reversed, conveys title which will protect against a motion for restitution after reversal. It is contended here, and mainly on the authority of the case of *Marks* v. *Cowles*, 61 *Ala.*, 229, that not only will such restitution be ordered as between the parties to the case, and as against the plaintiff when he has purchased, but also as against the assignee of a party who purchases. It is contended, and it is so held in the case named, that the party who purchases at such a sale, gets only a defeasible title, and can convey no greater title to the assignee than he himself obtains. The doctrine of this case would unquestionably require an order of restitution here. The correctness of the rule stated in that case is endorsed in *Freeman on Judgment*, Sec. 484. The question of the right to restitution of property when there has been a reversal of a judgment, by virtue of which a sale is made, has been several times before the Supreme Court of the United States. The last case to which attention has been called, or which has been found, is the case of *North Western Fuel Company* v. *Brock*, 139 *United States*, 216, and while that was a case where it had been held that the judgment was one which the Circuit Court had no jurisdiction to grant, still former decisions of the Supreme Court are cited and somewhat discussed. These cases, as well as the cited case by the Supreme Court, seem unquestionably to hold that restitution will be granted on a reversal judgment as between the parties."

After reviewing among other authorities, South Fork Canal Co. *v.* Gordon, 2 Abb. 479–488, Judge Newman concludes as follows:

"So it must be taken as established by undoubted authority, and indeed by controlling authority, that restitution would necessarily be directed in this case as against the bondholders who originally purchased the property at the sale.

"Now has there been such change in the title to the property as will protect it against restitution to the Huguley Manufacturing Company, the original owner? There would be no difficulty whatever, as to the Galeton Cotton Mills as it was originally organized, with the stock in the hands of the bondholders who purchased at the foreclosure sale. The real trouble is that the holding of the stock is changed from these parties to the West Point Manufacturing Company. The West Point Company is not a party here, but the fact of the transfer of the stock has been put in evidence on the hearing of this motion by the Galeton Cotton Mills for the purpose of showing that its stock had gone into other hands, and that the parties to this case are not the real owners of the stock, and consequently of the property. L. Lanier appears by the evidence to be

the president of the Galeton Cotton Mills, and secretary and treas urer and active official, so far as this transaction is concerned, o The West Point Manufacturing Company. He was also the prin cipal member of the purchasing committee for the bondholders, an he was quite a large holder also of the stock of the West Poin Company.

"It cannot be said, therefore, that there is such alienation o this property to a stranger, to one new to the transaction, as woul make it necessary to go into this case to the extent that the Su preme Court of Alabama went in the case of *Marks* v. *Cowle supra*. But the truth seems to be, as is urged, that L. Lanier, wh was the principal acting in the purchase, was in all subsequen transactions the representative of buyer and seller of assignor an assignee. I am not prepared to take issue with the doctrine o Marks *v.* Cowles, *supra*, but if it is necessary in the opinion of th court to invoke it in this case, as under the peculiar facts show here, while restitution will involve some complications and som difficulty, perhaps, in its practical enforcement, I feel it my dut upon the repayment of the cash paid by the purchasers, to direct i Before any order is made in the matter, however, it will be neces sary, probably, to hear counsel as to its terms and conditions. I may be proper to add that in the opinion of the appellate court direct ing a reversal of this case, this language is used: 'It is obvious tha there was such substantial error in that finding as must, on appea vitiate all subsequent proceedings.' The record in the appellat court showed the sale and the confirmation of the sale, and th language used clearly indicates that the proceedings up to the tim of the purchase by Lanier and others as representatives of th bondholders, in the opinion of that court was annulled by its judg ment of reversal."

In view of the foregoing pronounced adjudication on his part, i is difficult to conceive how the honorable judge could reconcile hi right to withold the possession of the property and the accountin for rents upon the flimsy pretext exposed *supra*.

X.

The court without power to change the terms of sale and then con firm—should either confirm or set aside the sale, but cannot modif its terms—cannot reverse, annul, or modify decree after end of it term. Such an act would have no validity.

In Rorer on Judicial Sales, Sec. 126, p. 57, it is said:

"But it (the court) cannot change the terms of sale and then con firm. Such an act would have no validity."

Ohio Loan and Trust Co. *v.* Goodin, 10 Ohio St. (N. S.) 557
Renz *v.* Hines, 3 Kansas, 390.

In the case of Compton *v.* Jesup and Dixon, Trustees, &c., 167 U. S. 55 (see S. C. Rept's ed. 1–37), the court say:

"And it may well be doubted whether it was competent for the Circuit Court, at a subsequent term, to disturb the rights of Compton, defined and adjudicated at a previous term in the final decree of sale.

"A judicial sale must be made in accordance with the decree of the court, and its terms cannot be changed by agreement of the parties or counsel, not incorporated into the record. The officer conducting a sale is not required to entertain any bids coupled with conditions not in conformity with the terms of the decree."

Nebraska Loan and Trust Co. *v.* Hamer, 40 Neb. 282 and 293–4.

"A purchaser at a judicial sale is entitled to look to the judgment or decree for the measure of his rights, and need look no further. It is his contract with the court and should not be changed."

Central Trust Co. *v.* Wabash, St. Louis and Pacific Ry. Co., 30 Fed. 332.

Citing:

38: 63.

38: 64.

In the Central Trust Co. *v.* Wabash, St. Louis & Pacific Ry. Co., 30 Fed. 332, it is said:

"Held that it was too late, after such decree and sale, for holders of such underlying mortgage bonds to object to the manner in which the earnings of the system had been applied prior to the decree and to proceedings to foreclose their mortgages, and *too late for the court to so alter the decree as to change the rights of the purchasers.*"

38: 63–4.

And the court concludes:

"And *no court ever did, and no court ever ought to change the contract which it has made.*

"Concurring fully in what has been said by the circuit judge, I shall add but one or two suggestions: An insuperable objection to granting the prayer of the petitioners, in my judgment, lies in the fact that such action would materially modify the terms of the decree under which the purchasing committee have bought, and, in effect, compel the committee to take the property on different terms than were proposed at the time of sale, and this after the contract of sale has been partially executed. * * * I merely emphasize the point that we have no legal right, at this time, the decree having been settled after mature deliberation and with full opportunity

to all parties to be heard, to modify its provisions or take any action that would, in effect, change the terms of sale."

Central Trust Co. *v.* Wabash, St. Louis & Pacific Ry. Co., 30 Fed. 332.

See also rule laid down in Black on Judgments, Vol. I, Sec. 154, and cases cited.

Beach's Mod. Eq. Prac., Sec. 850, and cases cited.

That the Circuit Court of the United States for the Northern District of Georgia, did, on June 4, 1898, and on October 15, 1898, —three years, six months, and fifteen days after its decree of sale, and two years, five months, and nine days after the second pretended sale,—change not only the *terms* of sale for *cash* (or payable in bonds) to *a three-year credit sale*, at 7 per cent. per annum, and exempting the purchaser from rents meantime, but change the *parties* from the bondholders in whose name the property was knocked down and formally reported to L. Lanier, *individually*, or such persons as *he* might designate. See—

Final Decree of Mch. 30, 1895, Part III, pp. 6-11.

Order Directing Resale of Property, Mch. 10, 1896, Part III, p. 13.

Commissioner's Report of Sale, May 27, 1896, Part III, p. 19.

Petition of L. Lanier for Confirmation of Sale, May 27, 1896, Part III, p. 20.

And compare the terms of these with—

Decree on Application to Apply Rents to Mortgage Debt, June 4, 1898, Part III, p. 64.

Petition of L. Lanier, "Purchaser," for Deed Absolute, Sept. 22, 1898, Part III, p. 67.

Answer to Petition of Lanier, Oct. 4, 1898, Part III, p. 69.

Decree Upon Petition for Deed, etc., Oct. 15, 1898, Part III, p. 72.

XI.

The court without power, after the adjournment of its term, to change the "parties" to a sale. Deed can only be made to the original bidder or purchaser. If bidder fails or refuses to complete the purchase and payment, another person should not be allowed to take the property at the former bid.

"Upon a sale by a master, if the bidder to whom the property is

struck off refuses to complete the purchase, the master SHOULD NOT ALLOW *another* PERSON TO TAKE IT AT THE FORMER BID."

Daniell's Chanc. Prac., Vol. 2 (6th ed.), Sec. 1282, p. 1267, citing: Thompson *v.* Dimond, 3 Edwds. Ch. 298.

"THE DEED CAN ONLY BE MADE TO THE *original* PURCHASER AT THE SALE, or to his successor in interest."

Freeman on Void Judicial Sales, Sec. 46.

Carpenter *v.* Sherfy, 71 Ill. 427.

"A conveyance TO A PERSON NOT ENTITLED TO RECEIVE IT, as where a deed is given to one 'AS ASSIGNEE,' when *no* assignment has been made, *is void*."

Freeman on Void Judicial Sales, Sec. 46.

Carpenter *v.* Sherfy, 71 Ill. 427.

"If the Wabash Railroad Company be regarded simply as an *outside* PURCHASER, it cannot be heard to object to the terms of the decree of sale."

Compton *v.* Jesup, 167 U. S. 55.

In this connection, the attention of the court is especially asked to the "Petition of L. Lanier, for a Deed Absolute" and the admissions thereunder, on pages 67–9 of Part III, and the "Answer to Petition of L. Lanier for Deed" filed by the Huguley Manufacturing Company, Part III, pages 69–72, and to Judge Newman's "Decree upon Petition for Deed Absolute," Part III, pages 72–74. (Yellow cover).

XII.

Rights of lien-claimant; acquiescence in decree; purchaser at foreclosure sale, subject to liens established or to be established bound thereby, and cannot object to enforcement of lien or a re-sale; trust relation set up, involving accounting for rents and profits.

While appellants contend that the pretended sale of May 6, 1896, absolutely failed, and was utterly void for non-compliance, in any event, if it could be held to be a sale, as pointed out in their petition for a rehearing before the Circuit Court of Appeals (Part III, p. 99) said sale was subject, in express terms, to the prior lien vested in them by decree of the Circuit Court of June 25, 1896, confirming, in part, said sale, but expressly subject to the following prior lien for rents and profits, etc., there and then vested in them, which

could not be taken away nearly three years afterwards, at the mere *dictum* of said court. We quote:

"3. An order of reference having heretofore been entered in this cause directing Thomas B. Fielder, Esq., to ascertain and report to the court certain claims for rents, profits, wastes, and conversions in respect to the said property, and said investigation now being in progress before said special master, it is ordered, adjudged, and decreed that should the said accounting finally result in a judgment in favor of the Huguley Manufacturing Company, then such judgment, for any amount thereof in excess of any deficiency due by the defendants to the complainant in the foreclosure proceedings shall, for such excess be, *and remain a lien upon said property in favor of the Huguley Manufacturing Company, as against the purchasers at said sale or any persons holding under them.*

"*And the court retains and reserves the right to seize and order a sale of said property for the purpose of satisfying any such balance so found to be due as hereinbefore set out, and the title shall be made by said commissioner to the purchaser subject to this provision.*"

Part III, page 25.

In Compton *v.* Jesup & Dixon, Trustees, 167 U. S. 55 (See S. C. Reporter's Ed., pp. 1–37), is held in the head notes as follows:

"The right of a lien-claimant, reserved in a foreclosure decree which provides that if his lien is established he shall be paid a certain sum, in default of which the court shall resume possession of the property affected by his lien, and enforce the decree rendered in his favor 'by a resale of such property or otherwise, as this court may direct,' includes the right to a resale of the property, and is not limited to a redemption thereof.

"Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien-claimant, and who participate in the benefits of an early sale thus secured, cannot object to the enforcement of the lien in the manner pointed out in the decree.

"A purchaser on a foreclosure sale cannot object to the terms of a decree of sale which provided for a resale on certain conditions.

"A purchaser of a railroad on foreclosure under a decree reserving the rights of a lien-claimant, holds a trust relation which involves an accounting until the lien is disposed of."

See Compton *v.* Jesup, 167 U. S. 55.

This case is so perfectly analogous to the case at bar that it is deemed best to quote therefrom the following extracts from the opinion of Mr. Justice Shiras (Decided in 1897), who held as follows:

"We think that these observations (on part of the lower court) show a plain disregard by the learned court of the terms and obvious meaning of the decree of March 23, 1889. When the terms of that decree were fixed, all parties to be affected thereby agreed to the same. The issues raised by the pleadings as to Compton's claim were *still pending and undetermined*. It was evidently the wish and the interests of all the parties to have the sale effected at once; and in order to avoid the further delay that would be occasioned by awaiting the determination of these issues, the provisions or reservations in Compton's favor were put in the decree."

[In case at bar no such consent was had, but that sale resisted.]

* * * * * * *

"When, etc. * * * we do not think it was open for the court, consistently with the terms of the decree of March 23, 1889, to deprive Compton of the rights and remedies therein conferred. * * * When the Circuit Court speaks of a re-sale as inequitably affecting the rights of the prior lien mortgagees and of the purchasers who have succeeded thereto, it is evident that the court overlooked those provisions of the decree which, in express terms, subjected such purchasers to Compton's rights to a re-sale, if they do not choose to pay him the sum awarded by the decree. So when the court says that Compton could as well have been a bidder at the sale as at a re-sale, if one be ordered, it omits to notice that when the sale took place under the decree, Compton's claim was *undetermined*, but that provision had been made for him in the event that his claim was held valid. He could not safely bid because he could not foresee whether his claim would be allowed, and the arrangement made relieved him, very properly, from the perplexity to which he would have been subjected if the sale had been unconditionally made, when the fate of his claim was uncertain."

* * * * * * *

[In case at bar the Huguley Manufacturing Company proposed to bid $200,000.00 for the property if the court would postpone the sale until the coming in of the master's report. Part III, p. 23.]

"The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect. That portion of said decree which established Compton's rights was, in its nature, final; the only matter which was kept in reserve as respects Compton, was the awaiting the determination of the validity and the amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the Circuit Court, at *a subsequent* term, to *disturb the rights of Compton*, defined and adjudicated at a *previous* term in the final decree of sale."

The court, after reviewing the case of Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, and of Swan *v.* Wright's Executor (Swan *v.* Fabyan, 110 U. S. 590), concludes:

"But we think the better view is that the Wabash Company should be regarded as a party in possession under the express terms of the order of sale, and as representing all parties in interest, including Compton; and hence, cannot claim to be an absolute purchaser of the rights of a mortgagor not subject to account for rents and profits. In that point of view, there is a trust relation, which involves an accounting until Compton is disposed of."

Compton *v.* Jesup, 167 U. S. 55.

The same principle is upheld by this court in other familiar cases.

Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 227.

Kneeland *v.* Am. Loan & T. Co. of Boston, Sup. Ct. ed. 34: 379.

Markey *v.* Langley, 92 U. S. 701.

Whiteside *v.* Haselton, 110 U. S. 152.

Stewart *v.* Gay, 127 U. S. 518.

Freeman on Judgments, Sec. 208.

Norton *v.* Nebraska Loan & T. Co., 35 Neb. 466, and cases cited.

The history of the gross errors committed by the master in connection with the reference and accounting taken in favor of the movants, the Huguley Manufacturing Company, up to May 6, 1896, incident to his use of certain books vouched for by the officers and attorneys of the accounting parties and insisted upon as being books of original entry, but after the evidence was closed, proven to be patent *forgeries* and ruled out by him as such, has been so exhaustively treated, and the fraud so clearly exposed in the brief of Messrs. Farrar, Jones, and Kruttschnitt and J. M. Chilton, under their previous petition for *certiorari*, that we here reproduce the text of same *in hæc verba*, and also quote from their brief on one or two other material points. The original of this brief (revised) they have filed under this appeal, and we beg the court now to re-examine the same, in connection with those filed by Hon. John T. Morgan and by ourselves herewith, and also upon our petition for writ of prohibition, mandamus, etc.

XIII.

"The proceedings before the master on the reference were conducted and the report of the master was made in violation of the terms of the reference and of the seventy-ninth rule in equity prescribed by this Honorable Court. The refusal of the Circuit Court of Appeals to consider this assigned error amounted to a denial of justice by said court."

The master's report bears on its face evidence of the truth of this charge.

Part III, pp. 25–38.

The assignments of error state the details with minuteness, and it is unnecessary to repeat them here.

Part III, pp. 79–95.

XIV.

The action of the master in admitting as evidence books and vouchers of the complainants without proof of their identity, verity, or contents by those who kept the books and made the vouchers, in excluding the books when they were shown to be forged, in refusing to exclude the vouchers, and then in continuing to use the excluded books and the unproved vouchers, as the basis of the accounting, was error of such a nature as to vitiate his whole report.

The refusal of the Circuit Court of Appeals to consider this specially assigned error amounted to a denial of justice by said court.

The single episode of the forged books, shown to be in the same handwriting as that of the account sales of Boynton & Co., the sellers of the product of the mills, which were tendered in evidence as the *original* books of the Galeton Cotton Mills, the ruling of the master that he would let them "come in as a memorandum," his use of them in basing his report upon their footings, and deducting from the amount due respondents an alleged loss shown by them in the operation of the mills, were sufficient to condemn this whole report apart from any other consideration.

Even if they had been original, these books were not admissible in evidence in behalf of the corporation. (Wharton on Evidence, Sec. 662.)

And, if admissible, their genuineness and correctness ought to have been shown by the testimony of the person who kept them. (Wharton on Evidence, 1131; Chaffee & Co. *v.* U. S., 18 Wall., p 541; Nicholls *v.* Webb, 8 Wheaton, 326; Ins. Co. *v.* Weide, 9 Wall. 617.)

Even the pretended books produced were incomplete and worthless. There was no day-book, no cash-book, and no stock-book (*i. e.*, a book showing the product of the mill and its disposition), and it was, therefore, impossible to check the pretended ledger.

The pretended vouchers were in the same condition as the books. The testimony of no witness who made any voucher, or who knew the contents thereof, or who conducted the transaction it purported to certify to, was taken.

To check the forged books, let in "as a memorandum," by vouchers of this kind, was a simple travesty, and to hold that the parties entitled to the accounting were bound by the results of these pretended books and vouchers, and that these documents conclusively showed what the actual rents and profits of the mill were, and that the burden of proof was on the defendants to attack the footings shown by these books, was a wide departure from the most elementary principles of right.

There was more than one circumstance to discredit and condemn these books.

In the first place, they were produced and offered as books of *original* entry, and were afterward shown to be *forgeries. No explanation was ever tendered of these facts.*

In the second place, they were shown to be in the same handwriting as the pretended account sales of the product of the mill.

In the third place, they were incomplete and not accompanied by any day-book, cash-book, or stock-book.

In the fourth place, when first tendered and identified by Lanier, on February 17, 1897, they were written up only to January 1, 1895. Respondents demanded that they be impounded, and the master so ordered. By some means not explained they were abstracted, and, when returned on the complaint of respondents, *were written up to August*, 1896. *No explanation was ever made of the mysterious additions to these books.*

The petition for an accounting was pending from March 13, 1893. The term of the accounting extended from September, 1892, to April 30, 1896. Therefore, accountants *were warned of their coming responsibility.* They could have made their accounting as clear as the noon-day sun, with a specification of detail and a wealth of

original evidence of confirmation that would carry conviction in any mind. They were business men and not greenhorns. They operated under the form of a corporation where discipline could be rigid and no divided counsels prevail. But it was their interest to show no profits. They were bound to operate the mill, and such a mill must make money. How conceal the fact that it did make money? Overcharge for cotton bought! One cent a pound on the amount consumed reduced the profits $50,000. Undercharge for the goods sold! One cent a yard on the goods produced reduced the profits $100,000, and these were the amounts proven by numerous witnesses as the overcharge on cotton and deficit or under-return for the duck. Pay enormous commissions, high rates of interest, large discounts on datings!

Every circumstance connected with this accounting was such as to induce a seeker after justice to scan every item and document produced by these parties with suspicion.

But how work all this so as to save for the accountants the real profits of the mill? Very simple. Let the individuals, who are the real parties in interest, buy the cotton, sell the product, receive the commissions, and charge the interest. And that is just what was done in this case. The commercial firm of W. C. & L. Lanier bought the cotton, and the commercial firm of N. Boynton & Co. sold the product, got the commissions, the discounts on the datings, and the interest. L. Lanier was one of the purchasing committee at the first sale, was the whole purchasing committee at the second sale, was president of the Galeton Mills and of the West Point Mills, to whom all the stock in the Galeton Mills had been sold.

Horace Sears was treasurer of the Galeton Mills, and a member of the firm of N. Boynton & Co., and he and the other members of that firm were large stockholders in the West Point Mills.

The books of the Galeton Mills showing what Lanier & Co. had charged them for cotton were not enough. These persons were not the sellers of cotton, but the mills' agents to buy. They could have shown, and their principals ought to have made them show, the date of each purchase, the marks of the bales, the places where bought, the price paid, and the names of the vendor; and their statements could then have been verified.

Surely the accountants owed this same obligation to the owners of the property!

Not knowing these facts, which the accountants ought to have been made to show, petitioners established what the average price cotton was, day by day and month by month, in the markets where

this cotton was bought, and compared this with the average price of the cotton charged to the Galeton Mills by Lanier & Co., day by day and month by month, and demonstrated an enormous overcharge.

The master disposed of this demonstration by saying (Rec., p. 94): "The movant undertakes to establish such an inference by a comparison of the prices paid with certain average prices of cotton for specified months. It would seem that the proper way to show such overcharges, if they existed, *would be to show the date and amount of each purchase, and the market price of cotton in West Point on those days.*"

But there was before the master evidence to show these very facts in the very way he wanted them shown. The Galeton Cotton Mills' cotton book showed the date, number of pounds and price charged for cotton. The original cotton books of Atkinson & Turner, of West Point, Ga., large cotton buyers, were also in evidence, being offered by accountants. These two books were compared date by date, and they showed an overcharge for cotton amounting to $44,410.67.

The account sales of Boynton & Co., not identified by the man who made them, not verified by the oaths of the persons who conducted the transactions therein certified to, not accompanied with any proof of the disbursement of the enormous charges, deducted from the gross proceeds, were not sufficient to show anything on earth except that such papers were in existence and had been sent from Boston by Boynton & Co. to the Galeton Cotton Mills.

Movants were driven to the same method of proof by average prices, day by day and month by month, to demonstrate a sale of the product below the market price.

They made this demonstration beyond the peradventure of a doubt, and the master disposed of it as follows (Part III, pp. 34-5): "The movant introduced a number of witnesses who testified to the average prices of these classes of goods, and seeks to show, by a comparison of the average prices testified to by these witnesses with the average prices realized by the Galeton Cotton Mills, that the prices realized were far below what they should have been. It would seem that in impeaching the account of sales rendered by the respondent the movant ought to show that the goods at the time they were sold brought less than the market price of the same grade of goods at the time and place of sale, *and that the failure to realize the best price obtainable was by the wilful default of the respondent.* Neither of these propositions is shown by the evidence, while the evidence for the movant, in the shape in which it is presented, may suggest

an inference that the goods sold for account of the Galeton Mills ought to have brought better prices, still the evidence *strongly indicates* that the product of this mill was not equal in quality to those goods to which the market price applies."

The testimony which gave this "strong indication" was that of Lanier and Wellington, a partner of N. Boynton & Co.—two interested witnesses, absolutely contradicted by J. S. Hamilton, Geo. W. Hamilton, Henry Harvey, T. A. Burke, R. J. Patton, Wilmer Moore, D. O. Dougherty, Jos. Kingsbery, and W. S. Everett, all entirely disinterested and all engaged in the cotton duck business as operators of competing duck mills *in the same* territory, or jobbers in duck.

But even then, allowing for all the depreciation in the quality of the duck made by the Galeton Mills, below standard duck, sworn to by these two men, and not one-half of the deficiency below the price realized was accounted for.

Wellington said the undervaluation, owing to lower quality, was from 2½ to 5 per cent. This would make 10-oz. duck, of which market value was 8.50 cents per yard, with 5 per cent. off, realize 8.7 cents, or less than one-half a cent per pound off.

Lanier said the undervaluation owing to quality was from one-quarter to one-half a cent a yard.

But the testimony showed an average deficit of 1.24 cents per yard all round. Even allowing full force to the claim of lower quality, there was an unexplained deficiency in price of .74 of a cent per yard. The allowance of this comparatively small deficiency would have made the accountants pay petitioners $62,665.84 on this item alone.

Because of its great importance, as evidencing the desperate tactics employed by these accounting parties in their vain endeavor to escape disgorging the large sum of rents and profits decreed against them in favor of interveners, the Huguley Manufacturing Company, it is deemed advisable as a ready reference of the court to here append the evidence of Judge Chilton, and of the expert accountant, Mr. Hamilton (witnesses for movants), with other evidence of Lanier, exposing the wholesale fraud and outrageous conspiracy on part of defendant accounting parties by which they sought to palm off upon the master and upon these appellants certain books and accounts sales which were proven by the *water marks* and otherwise to have been *forged out of the whole cloth*. Upon these forged documents, *no other oral evidence being offered*, the appellees planted their whole defence to the charge of $228,000.00 for rents by appel-

lants, which was proven by numerous witnesses of the hi
tegrity and standing and who appeared in person, whose t
was *admitted* and yet *ignored* by the master who elected
such false and fraudulent documents in preference.

EXTRACT FROM TRANSCRIPT OF RECORD, VOL. 3.

(Condensed Transcript of Printed Record, with Extra
Record No. 798, certified up by McKee, Clerk Circuit Cou
peals, Fifth Circuit, on application for *certiorari*. Pp. 188

(Typewritten and Unprinted.)

Old Nos. pp. 1353–1354.
New Nos. pp. 1569–1570.

TESTIMONY OF L. LANIER, taken February 16, 1897

(Direct Examination by P. H. Brewster.)

Q. We put in a book yesterday that contains all of tho
is that book?

A. There are the books; they are on two books there.

Q. Which one of those contains all the matter you ha
contained on the vouchers that you have stated were corre

A. Those two books, one is the "*Journal*" and the
"*Ledger*."

Q Have you checked all that book and know it correspo
those vouchers?

A. I didn't do it all myself; I hired part of it done.

Q. The vouchers for all those charges are containe
bundle?

A. Yes, sir.

Judge Hammond: If the witness has not done it himself
swear to it.

Col. Brewster: We tender the books in evidence.

Judge Hammond: I object to the books being in evid
has not been testified that they are correct by the party
them.

The Master: If I find that the vouchers have been in
entered, or column of figures has been wrongfully totalled
consider the books.

Judge Hammond; I object to the books as original evid

Col. Brewster: I insist that they go as original evidence

Judge Hammond: I make the point, they are not admissible as original evidence, because the foundation for the books has not been properly laid. The evidence does not show that the entries on the books are correct.

The Master: I think they are admissible, since they bring the original vouchers and tender them along with the books; I think that makes it original evidence.

Judge Hammond excepts to the ruling.

Examination by Judge Hammond:

Q. Mr. Lanier, do those books contain all the vouchers, all the entries from all those vouchers, of your own knowledge?

A. I have not checked all of them; I have not gone over all the items.

Q. You have not rechecked them all?

A. Not all of them.

Q. How many have you checked?

A. Some of the first; perhaps a year and a half of them.

Q. Out of that period of time?

A. The first of the operations of that mill?

Q. A year and a half out of the period of three years and eight months?

A. Yes, sir.

Q. Do they contain anything else except what is in those vouchers?

Do those books contain any other entries except what is in those vouchers?

A. They contain credits for the sales of the goods.

Q. What I want to ask you is this: did they contain anything in addition to the things you testified about, the Account Sales, the credits and dates from those vouchers? they contain nothing else but those?

A. No, sir.

No. 1355–1371.

Judge Hammond: I object to the books as original evidence, on the ground that they are not sufficiently shown to be correct.

The Master: As the books are accompanied by those other papers, as an earnest of their correctness, I will admit them.

(By Col. Brewster.)

Q. These papers contain your disbursements?

A. They do; yes, sir.

Q. They contain all that has been paid out?

A. Yes, sir.

Q. Where is the original evidence of your receipts?

A. Those Account Sales.

Q. What are they?

A. The Account Sales made by our selling agents; the accoun rendered by the selling agents of the goods sold for each month; the month; they are made out by the month.

Q. Does that cover the whole period of time?

A. That covers up to the first of January, 1896.

Q. Who was your Selling Agent?

A. N. Boynton & Co.

(By Judge Hammond.)

Q. Do the books cover the whole time?

A. Yes, sir.

Q. These books come up to the first of January; the Accou Sales come up to the first of January?

A. Yes, sir; the other accounts sales will be forthcoming.

Col. Brewster: We tender these books in evidence.

(By Judge Hammond.)

By Judge Hammond.

Q. (By Judge Hammond:) These are accounts sales rendered y by your selling agents?

A. Yes, sir; N. Boynton & Co., Boston.

Q. Those are papers sent you by your selling agents in Bosto and you don't know whether they are correct, except that you kn those accounts cover all goods sent you by your selling agents?

A. Yes, sir.

Q. But whether they are correct or not, you don't know?

A. In what way?

Q. You don't know whether the prices of those accounts sales a the real prices received for the goods?

A. They were satisfactory prices, the prices given.

Q. Were they the market prices?

A. Yes, sir.

Q. The full market prices for those goods?

A. I considered they were.

Q. Do you know that of your own knowledge?

A. Well, yes.

Q. You say, "Well, yes;" why do you hesitate?

A. I don't sell any goods myself.

Q. Therefore, you don't know, of your own knowledge, about it; you depend upon others for your information about it?

A. I depend upon others for the market.

Q. Who did you get your information from?

A. From different periodicals and the prices made by people.

Q. Did you keep up with them yourself, or is there some other man connected with it who does?

A. It is my business.

Q. It is your business to keep up with the sales and prices?

A. Yes, sir.

Q. You get them from the market reports?

A. Yes, sir.

Q. You can't say, from your own knowledge, that those prices correspond with the market reports?

A. For that grade of goods?

Q. Did you examine these reports to see if they would correspond, check them with the market reports?

A. I didn't do that each time; no, sir.

Q. I wanted to know whether you made it your habit to do that or not. I want to know whether you were careful or not each time to see whether they had obtained the market prices.

A. I go over the lists of accounts sales carefully.

Q. I understand you go over them and see that they brought so much, but can you say these accounts sales show that those sales were made at the market prices?

A. Yes, the prices were satisfactory to me at the time they were made.

Q. You stated that once, but you can't say they were the market prices?

The Master: Suppose those were not the market prices, and suppose that during the entire period covered by these transactions, his agents stole from him, and he really got less than he ought to have gotten, but through no fault of his, would that render the evidence admissible?

Judge Hammond: I don't admit they are correct.

Q. (By Col. Brewster): You sold your goods and that is an account of the sales?

A. Yes, sir.

Q. (By Judge Hammond): Those are accounts sales of N. Boynton & Co.?

A. Yes, sir.

Q. They are co-defendants in the original case by virtue of their being owners of stock in the West Point Manufacturing Company?

A. Yes, sir.

Q. How much stock do they own in the West Point Manufacturing Company?

Col. Brewster: I object to this testimony. I will ask how N. Boynton & Co. are regarded in the commercial world?

Judge Hammond: I object to that.

Q. Mr. Lanier, do those papers contain all the money that the Galeton Cotton Mill got for the sale of its product of every kind and character?

A. Yes, sir; unless it was some small sales that were made at the mill.

Q. Where will those sales appear?

A. On the cash account.

The account sales referred to, and about which the witness was examined, tendered in evidence, and marked with the name of the stenographer and the date, February 16, 1897.

* * * * * * *

The journal and ledger are introduced in evidence by the respondents, and identified by the name of the stenographer and the date, February 16, 1897.

* * * * * * *

Judge Hammond: We ask that the books be impounded.

The Master: You will turn the books over to the Clerk. (February 17, 1897).

All the books and papers which have been identified were offered in evidence and allowed.

Judge Hammond: I desire to have exception noted to all the rulings against me on the admission of any books and papers.

* * * * * * *

Judge Hammond: We ask that the Court require the books returned that were taken away.

The Court: Counsel complains that the journal and the ledger have been taken away and ask that they be turned over. I ask that

they be turned over to Mr. Seab. Smith, stenographer, to be delivered to Mr. D. O. Smith.

Col. Brewster: They are all here.

May 5, 1897.

Condensed printed record or extracts from record on *certiorari*, pp. 188–193.

EXTRACTS FROM RECORD, VOL. 3, OLD NO. p. 1506, NEW NO. p. 1720.

(Cross-Examination by Judge Hammond.)

Q. Who kept the books of the Galeton Cotton Mills, Mr. Lanier?

A. Mr. Winston kept the cotton books; Mr. Higginbothem kept the cloth production book; my firm kept the in town, and the treasurer kept his books.

Q. Who was the treasurer?

A. H. S. Sears.

Q. Who made out the account sales?

A. The selling agents.

Q. Who were they?

A. N. Boynton & Co.

Q. What individual made them out, the account sales? Would you know by looking at the accounts?

A. I don't know.

Q. Do you know by looking at the handwriting?

A. No sir; I do not.

Q. Wasn't it H. S. Sears?

A. I don't know; I would say at a guess, it was not him. It don't look like his handwriting?

EXTRACT FROM TESTIMONY OF JAS. S. HAMILTON, EXPERT ACCOUNTANT AND WITNESS FOR MOVANT.

Vol. 3, Old No. p. 1567; New No. p. 1781.

(Direct Examination by Judge Hammond):

Q. What else have you figured on in connection with these books besides what you have stated as to the result of those books?

A. The only thing I could check was cotton; I have checked the cotton.

Those books, there was nothing but a Journal and Ledger; there was no pass-book; there was no day-book; there was no book of original entry; no stock-book, and no cash-book.

Q. Is a Day-Book an essential book?

A. It is absolutely essential.

Q. Can you get at the actual results without a Day-Book?

A. You cannot check a Ledger and Journal without a Day-Book and a Cash-Book to check against. You have nothing to check against.

Q. Do those books constitute a full set of books?

A. They do not.

Q. What else is omitted besides a Day-Book?

A. A Cash-Book and Stock-Book.

* * * * pp. 1568 (01, p. 1782, New No.).

Q. Those books of N. Boynton & Co.; have you examined those books?

A. I did.

Q. I will get you to state whether or not, in your judgment, those are original books of N. Boynton & Co., and if not why would you say not?

A. I should say not.

Q. Why not?

A. Because, there is not a check-mark on them, showing where they have been checked over; nor a check-mark to show where they have checked to get a trial balance, and besides the books are perfectly clean.

Q. There is no appearance of use on them at all?

A. No, sir.

Q. Could books of that kind be kept without showing use?

A. No, sir; to go over a period of that length of time I should say they could not.

Condensed printed record or extracts from record on *certiorari*, pp. 188–194.

EXTRACT FROM TESTIMONY OF JAS. S. HAMILTON, EXPERT ACCOUNTANT,—WITNESS FOR MOVANT.

(Vol. 3, p. 1577 (Old No.); p. 1791 (New No.).

(Direct Examination by Judge Hammond):

Q. Compare the handwriting of the Accounts Sales with the handwriting on the books of N. Boynton & Co., or on the Accounts Sales of N. Boynton & Co. with the book that I hand you, and state whether or not they are in the same handwriting.

A. I have examined them, and, with some exceptions, the Accounts Sales are in identically the same handwriting that there is on the books.

Q. On this Journal?

A. Yes, sir.

Q. And the same is true of the Ledger?

A. Yes, sir; the same thing is true.

Printed record on *certiorari*, p. 194.

EXTRACT FROM RECORD, VOL. 3, OF HEARING HAD BEFORE MASTER, JULY 12, 1897.

Old Nos. pp. 1634–1637.
New Nos. pp. 1848–1851.

Judge Hammond: We want to offer evidence to show that the books offered are not the original books of the Galeton Cotton Mills.

Col. Brewster: We object to the evidence offered.

The Master: I will let you introduce such evidence.

J. M. Chilton, sworn for movant, testified:

Direct examination by Judge Hammond:

Q. Did you discover anything from the internal evidence of these books going to show whether or not they are the original books of the Galeton Cotton Mills, commencing in 1892?

A. Yes, sir.

Q. Show the court the physical evidence in these books and state what it is and exhibit it to the court.

A. The age of the books as shown by a large part of the paper contained in the bound volume was manufactured after the date of the accounts set out in the book.

Q. What is the date of the manufacture of that book; the date of the paper?

A. The date of the manufacture of the paper that is in it as shown by the water-mark on the pages, these here are 1892 (indicating), and other portions of the same volume are 1894.

Q. Turn to a page that has a water-mark of 1894, and exhibit it.

A. Page 209 and a number of other pages.

Q. Turn to page 209.

A. That is simply one of a number of pages in the same book.

Q. Let us see the water-mark on page 209. (Exhibiting page of book.)

Judge Hammond: I exhibit to the master the water-mark on page 209 (reading) "Linen Ledger, 1894."

The witness: The same water-mark appears on page 211, and on a great many other pages on the same book.

Q. The same water-mark, 1894?

A. Yes, sir.

Q. What is the date of the first entry on that book?

A. September 27th, 1892.

Q. Do you find anything on the other book, the ledger, of similar import?

A. Yes, sir.

Q. Refer to a page of that and give us the water-mark.

A. The water-mark on all paper in this ledger, so far as I have investigated it, a large number of the sheets, I know, shows the date of the ledger as 1893, on page 107, for instance, of the ledger, and there are a great number of others.

Q. How did your attention come to be called to the water-mark on the paper of this book?

A. I was examining the book and I happened to notice there was a water-mark, and I put it between the light and saw the date of the manufacture.

Q. You discovered that during the last week?

A. I discovered that last Saturday.

Judge Hammond: We renew our motion to exclude those books.

Col. Brewster: We have predicated the book on the fact that there was a voucher to sustain ever entry; our case is predicated on the ground that we have produced the original vouchers.

The Master: I will report under the evidence that they are not the original books of the Galeton Cotton Mills. I will let them come in as memorandum, accompanied by the original vouchers. If the vouchers do not sustain them I will exclude them; I think that will operate to take the books out as original evidence. I would not be authorized to take those books as evidence in the case.

Judge Hammond: It appears they are not original evidence; they are not the original books, and copies are not admissible; we are entitled to the original books. We have now offered proof showing they can't be the original books of the Galeton Cotton Mills, and the gentlemen ought to bring the original books here. We did not ask for the production of the original books, have never asked for them, and they have not produced the original books.

The Master: They have tendered a number of original vouchers; the contention is, that the sum and substance of those vouchers are

reflected by those books, and are shown by those books, and when I come to make up my report, if there is an entry not corroborated by the original vouchers, I will reject them. I will hold under the evidence that those are not the original books. I think those two books, *per se*, have no probative value.

Judge Chilton:

I have a motion to make: We move, if the court please, to exclude the vouchers (accounts of sales) put in evidence as having come from Boynton & Co., selling agents; first, on the ground that there is no independent evidence that those vouchers are correct, and, second, that no witness has testified to the truth of the facts disclosed by those vouchers.

The Master:

For the present the motion is overruled. I will hear from you in the argument of the main case, and if I am convinced I am in error will reverse my ruling.

Printed record on *certiorari*, pp. 196-199.

EXTRACT FROM TRANSCRIPT OF RECORD, VOL. 3, OLD NO. 1362; NEW NO. 1578.

(February 16, 1897.)

TESTIMONY OF L. LANIER (witness for respondent).

(Direct examination by P. H. Brewster):

Q. I will get you to state to the court the extract financial result of the operations of this mill for three years and a half; the period it was operated by the Galeton Cotton Mills from the first sale to the last.

A. The stock we had on hand on the 30th day of April, 1896, was estimated at 11½ cents per pound, and that leaves a loss in the operation of the mill for that time of $4,654.60. We estimated the goods on hand and get that result.

Q. By the Master: For what period of time?

A. From September 19, 1892, to April 30, 1896.

Q. That covers the entire period?

A. Yes, sir.

Q. That was a loss?

A. Yes, sir; $4,654.60.

(Direct examination by P. H. Brewster):

Q. You had some statements you had prepared as to the financial status of the Galeton Cotton Mills, referred to in your last answer; have you got those statements so you can hand them to the court?

A. Yes, sir. (Exhibiting papers.)

Col. Brewster: We tender in evidence these statements.

Q. You answered and gave the figures as to its condition when you were examined heretofore?

A. These (referring to papers exhibited) are more in detail. Here are the statements of receipts and disbursements showing the condition of the company.

Q. What is the first paper; just state so we will understand it.

A. I have compiled the production of the Galeton Cotton Mills. This (referring to statement) is the production by fortnights of the Galeton Cotton Mills. These sheets I have marked Nos. 1, 2, and 3; they also give the total production.

Q. From what period to period?

A. From the beginning, from our first return made September 30th. We bought the property on the 5th, received the title on the 16th, and this is our first production as returned on September 30, 1892.

Q. These sheets are numbered how?

A. 1, 2, and 3, and this ends April 30, 1896.

Q. That was after the last sale?

A. Just prior to the last sale.

Q. That wound up the entire period of time?

A. Yes, sir; those sheets are the production of the Galeton Cotton Mills from September 30, 1892, to April 30, 1896.

The papers exhibited and testified about are identified with the name of the stenographer and the date, May 4, 1897, and numbered consecutively, 1, 2, and 3, on the back thereof.

Q. What is that (exhibiting paper)?

A. That is a statement showing the cotton purchased, the aggregate for the same period.

Q. Does it give the price?

A. Yes, sir; the amount and the total dollars and cents.

Q. What period does that cover?

A. The same period.

Q. Is there one or two sheets of that?

A. Only one.

The paper testified about is identified with the name of the stenographer and No. 4, May 4, 1897, written on the back thereof.

Q. What is that paper (exhibiting paper)?

A. That is a sheet showing cotton opened and the production, and cost and sales.

The paper testified about is identified with the name of the stenographer and "No. 5," May 4, '97, written on the back thereof.

Q. What is the next paper (exhibiting paper)?

A. This is a statement of the receipts and disbursements of the Galeton Cotton Mills covering the same period.

The paper testified about is identified with the name of the stenographer and "No. 6," May 4, '97, written on the back thereof.

Q. Does that show the financial condition at the close of the administration of the Galeton Cotton Mills about which we are inquiring?

A. Yes, sir.

Q. From the beginning to the end?

A. Yes, sir, from beginning to end.

Q. When you were on the stand months ago you were asked if you ever checked the entire matter to ascertain the correctness of your own personal knowledge? At that time you said you had checked about a year and a half. I will ask you if you have since checked the remainder?

A. I have since checked it on through.

Q. State to the court if you have checked the entire business of the concern and know that it is correct?

A. Yes, sir, I have.

Q. You have checked it all?

A. Yes, sir.

Here the witness offers "duplicates" (unsworn and unidentified) for the missing "vouchers," so called, as itemized on pp. 1413–5, old numbers, and 1627–9, new numbers.

Q. Do you not know the amount represented by those absent receipts were paid?

A. Yes, sir; I know they were paid; our books show it.

Judge Hammond: I object to the statement that the "books show it." The best evidence would be the books themselves.

The Master: I sustain the objection and rule out that part of the answer that the books show those facts.

Judge Hammond: I have a further objection, but will make it on the cross-examination.

Q. During the time covered by your testimony, who drew the checks originally?

A. I bought the supplies and findings for this mill during the entire time, and I paid for them with check on the treasurer of the company or on W. C. & L. Lanier, who were the bankers for the concern.

Q. You know those items about which you have testified were really paid?

A. Yes, sir; I do. There are 8 items here I have not produced vouchers for, which I can get.

By the Master: Do you know the amounts were paid independent of the vouchers?

A. Yes, sir; I do.

Q. I will ask you whether or not you checked those statements you have testified about; whether or not you checked them all through yourself?

A. Yes, sir; I did.

Q. And they are correct?

A. Yes, sir; they are correct.

Colonel Abbott: We offer these statements and offer these duplicate vouchers in evidence, and also ask the privilege of supplying those 5 or 6 missing vouchers as soon as we can get them.

Judge Hammond: I object to the statements because it don't appear that he made them. He says he checked them from the books. If those statements are made by him as an expert, and he has gone through and made them as an expert, they are admissible, otherwise not. I don't think they have shown that he has done the work, and that it is correct.

The Master: As I understand it, those statements are condensations of what the books show through a series of years.

Judge Hammond: I object to all those papers because it don't appear that he made them out himself. He says he checked them up.

(By the Master): What do you mean by "checked them up?"

A. I checked the items on the books with the vouchers that we have presented, and I had bought the items that the vouchers covered, and that the books show were paid for.

Q. Do you know anything about books?

A. Yes, sir; I have had to do with books all my life.

Q. Is your experience in going over books and keeping books sufficient to enable you to go over a set of books and see whether they are right or not?

A. Yes, sir; it is.

Col. Abbott: I offer the papers in evidence under that statement.

Cross-Examination by Judge Hammond:

Q. Mr. Lanier, take this first paper introduced, the "Production of the Galeton Cotton Mills, Sheet No. 1, September 30, 1892"; you gave there the number of pounds, then the total pounds, and

then yards. Are those figures the result of a calculation or the result of just what appears on the books, copy of what appears on the books?

A. That is compiled from the superintendent's reports put in here in evidence in this cause.

Q. That is not taken from the books, but from those detached separate papers?

A. The superintendent made out his reports, and I compiled it from the reports. He compiled his reports from his books.

Q. Those papers put in as superintendent's reports were taken from the books, and this is taken from those reports?

A. Yes, sir.

Q. Did you make it?

A. This is merely copy of the report which I compiled. I compiled it.

Q. And those are compiled from the superintendent's reports?

A. Yes, sir.

Q. The superintendent's reports show these identical figures?

A. Yes, sir.

Q. Have you checked every one of those items with the superintendent's report, item by item?

A. Yes, sir.

Q. Did you put your check-marks on here?

A. I checked it from the other sheets, and these are rechecked.

Q. Where did you put your check-marks; on this paper?

A. I checked over the original paper which I made out every item.

Q. Only those numbers where the check-marks are those that have been checked?

A. All were checked, but this has been rechecked.

Q. Did you check them all, every figure?

A. Yes, sir; originally.

Q. What I am trying to get at is whether all of those figures were checked by you?

A. This paper was checked by the man who copied this statement. I gave him the sheets that I had compiled from the reports and pay-rolls of the superintendent, which are on file, and he made up this.

Q. Do you mean to say that this is another man's work, and that you did not check it?

A. I checked the original, but I did not check this to see whether this corresponded with my original paper. This was made up; copied by my book-keeper.

Q. Where is the original where you checked?

A. I have not got it with me.

Q. Where is it?

A. I suppose it is in my office.

Q. Were these copies made from the originals?

A. Yes, sir.

Q. Who made them?

A. Mr. Freeman, our cotton man.

Q. Do you mean the original reports?

A. The original document is the superintendent's report; I made up those papers from the superintendent's reports; then those are more decent copies of the instrument made out by me, but contain exactly the figures as the others.

Q. Who made the original, you?

A. Yes, sir.

Q. You made the original out?

A. Yes, sir.

Q. Yourself?

A. Yes, sir.

Q. This is a copy you made from that?

A. No, sir; I had it made.

Q. Have you compared it, item by item?

A. No, sir; I had the man to take the original and make that from it.

Q. Who did that?

A. Mr. Freeman; those are Mr. Freeman's figures.

The Master: Why not let those papers go in as a memorandum? Just let it be identified and let it go in as a memorandum in the case, and turn it over to Judge Hammond and Mr. Huguley and let them verify it if they desire to do so.

Judge Hammond: I think the figures made by an expert would be original evidence, expert evidence; it is frequently done; I want the expert here who done this work, and want him to testify that it is correct.

Col. Abbott: I want to say this, that the superintendent's reports are in as original evidence, they were sworn to, every one of them, as being correct. We offer these papers in connection with the others in order that some conclusion may be arrived at without taking the balance of human life to do it.

Old No. 1420.

New No. 1634. May 4, 1897.

L. Lanier resumed the stand, testified:

Discussion was had as to the admissibility of the papers testified to by the witness as having originally been compiled by him and copied by Mr. Freeman.

The Master: There are some books of original entry and some original vouchers that are already in, and Mr. Lanier, as I understand it, abstracted from the books and vouchers certain data which have been verified by him, and I have ruled that they might go in as memoranda and that I would verify it; they would not go in as original evidence.

The witness: I checked the footings, but the different items making the footings I did not check them.

Q. (By Judge Hammond): Did you make these footings yourself?

A. I made the footings on the original paper.

Q. Did you make them on the copy?

A. I did not, but I checked the footings on the copy and they corresponded with the one I did make.

Q. (By Col. Abbott): Have you compared the footings with the paper you made?

A. Yes, sir; I have.

Q. Did they correspond?

A. They correspond; they agreed; I compared themtand they agreed.

The Master: I will let in the papers with the understanding that if it is not admitted to be correct Mr. Smith and myself will undertake to verify it.

Q. Mr. Lanier, you state this mill lost a certain amount of money during that entire period—the entire operation; how do you know it lost that much money?

A. The results show it.

Q. The results of the operation of the mill; is that result calculated from the books?

A. Yes, sir.

Q. Who made that calculation from the books; who went through the books and made that calculation that shows that loss you have testified about?

A. That is made up from the books of the company.

Q. What individual went through the books and made that calculation?

A. I made it up from the difference realized for the goods, the proceeds of the goods, and the cost of making and marketing them; the cost was that much above the proceeds.

Q. My question was, who was it went through the books and made the calculation which shows this loss; did you do it?

A. I assisted in it.

Q. Didn't you have it done by somebody else?

A. A good deal of the clerical work is done by other people. don't do it.

Q. A good deal of the adding and calculating was done by othe people?

A. Yes, sir.

Q. You didn't do all the work that was done on those books?

A. No, sir.

Q. You swear to that amount of loss, that it is correct?

A. Yes, sir; and to the best of my knowledge and belief it is.

Q. To the best of your knowledge and belief, you say?

A. Yes, sir.

Q. Do you know it of your own knowledge?

A. I am entirely satisfied with it.

Q. You are satisfied those figures are correctly made by the pa ties you employed to make them?

A. Yes, sir.

Q. You are satisfied those figures are correct?

Q. You don't state they are correct of your own knowledge, b cause you made them?

A. They are correct from our receipts and expenditures; the co of the goods and receipts from goods shows that to be the corre amount of loss.

Q. You didn't make the calculations from which those figures a made up?

A. The account sales are made up from the sales and the n proceeds are shown on all accounts sales.

Q. Who made up those account sales?

A. The selling agents.

Q. Who set down the figures and made up those figures of tho sales?

A. I figured on all of them.

Q. Did you figure them yourself?

A. Yes, sir.

Q. How did you figure it, by taking the figures given you b others?

A. Largely by figures made by others.

Q. Explain what you mean by that?

A. We have to take the Pay-Rolls, Cost of Cotton, Supplies an Findings, incidentals, make up the total cost, and take the pr ceeds of the goods from the cost. Those figures are made up b others under my supervision.

Q. You have those figures made by others?

A. Yes, sir; most of them are.

Q. You could not devote enough time to do all that?

A. No, I could not make all those figures.

Q. This result is arrived at by you from taking the results of figures made by others?

A. Yes, sir.

Judge Hammond: I move to rule out the testimony of this witness that there was a loss by reason of the operation of this mill.

The Master: I will let it remain in for the present.

The ruling is accepted to.

Q. (By Col. Brewster): I would like to ask the witness a question right here. Didn't you verify all those figures?

A. Yes, sir; I did.

Q. You say you verified everything; how did you very it? Did you go over the calculations made by those people to see whether the calculations are correct?

A. It is not so much the calculations as the correctness of the figures showing the cost of the goods and the amount received, the proceeds of the goods.

Q. There had to be additions?

A. Yes, sir; the same as in all business of that magnitude. There had to be a great deal of it.

Q. Did you make all those additions yourself?

A. I either did it or had it done.

Q. Did you do it yourself?

A. Largely, I did.

Q. Did you do all of it?

A. Not in every instance. I don't know that I did that. I did it largely myself.

Q. Unless you know those additions are correctly made, you can't state this result is correct, can you? If the men you got to do the word did or did not do it correctly, you would not know that without checking up the work?

A. No, but I may have had some one else to do it and verified it in that way.

Q. Did you do that work yourself?

A. I very often did all that, but at times I may not have done it, and had some one else to do it.

Q. It took a great deal of figuring to get that result?

A. Yes, sir.

Q. How long did it take to do, and how many men did you have employed on that work?

A. There were three or four of us to do the work.

Q. How long did it take three or four of you to do the work?

A. It is brought up daily almost.

Q. In figuring for this testimony to get out this result, for this testimony you figured it out to get the result?

A. I only compiled it.

Q. You made it up for this record?

A. I had the figures already made. They are made as matter of fact every six months. We close our books every six months.

Q. You just took those semi-annual statements and made your statement from them?

A. They are all re-checked when the six months expire. At that time we check them up, and close our books, etc., etc., etc.

* * * * * * *

EXTRACT FROM TRANSCRIPT OF RECORD, VOL. 3, OLD NOS. pp. 1387–88. NEW NOS. pp. 1600–1.

Judge Hammond: I will give notice of another motion to exclude Mr. Lanier's evidence, on the ground that he used a memorandum which he has not filed.

Col. Brewster: We are going to file it.

Judge Hammond: I ask that it be filed with the stenographer.

The Court: If you will indicate what it is, I will order it filed.

Judge Hammond: The testimony of Mr. Lanier on the 16th day of February. He was examined then, and he gave from a memorandum the amount of cotton consumed from September, 1892, to May, 1896—5,278,429 pounds.

The Court: All that is on file. The stenographer has it down and has the book.

Judge Hammond: I move to rule out the evidence given on that day by Mr. Lanier, on the ground that it was read from the memorandum.

The Court: The motion is overruled.

Judge Hammond: I will ask you to certify that he did testify from the memorandum on that day. It does not appear in evidence that he was testifying from a memorandum. I ask that it appear in the record that he was testifying from a dozen sheets in his hands.

The Court: I do not know what part he testified independently and what part he refreshed himself by memorandum. He gave a good deal of independent evidence.

Printed record on *certiorari*, pp. 199–210.

XV.

The master's interpretation of the rule of responsibility of a mortgagee in possession, holding that "wilful default," meant fraud or wanton misconduct, and not "ordinary and reasonable diligence," was apparent in all of his findings. This was the gravamen of petitioners' exceptions in the court below, and was the complaint in the Circuit Court of Appeals. The Circuit Court of Appeals misinterpreted and misconstrued the position of appellants, and decided this point upon the ground that the appellants wished to apply to the complainants some other or different or stricter rule than that of a mortgagee in possession. This action of the master and the court resulted in the rejection of claims of petitioners exceeding $170,000.

A mere inspection of the authorities shows that the words "wilful default" mean "want of reasonable diligence," and that the two expressions are used as the equivalents of each other.

In Daniell's Chancery Practice, 1237, it is said:

"Sometimes instead of the words 'without his wilful default' the words 'with ordinary care and diligence' are used."

Most of the cases use the terms "with ordinary care and diligence," or "reasonable diligence."

Brickell's Digest, Vol. III, 657.
2 Daniell's Ch. (6th Am. Ed.), p. 1239.
Miller *v.* Lincoln, 6 Gray, 556.
Hughes *v.* Williams, 12 Ves. 493.
Benham *v.* Rowe, 2 Cal. 387.
Schaeffer *v.* Chambers, 2 Halst. Ch. (N. J.), 548.
2 Jones on Mortgages, Sec. 1123.
Strong *v.* Blanchard, 4 Allen, 538.
White *v.* Atlas Lumber Co., 68 N. W. Rep. 359.
Richardson *v.* Wallis, 5 Allen, 78.

The rule of diligence as established by the U. S. Circuit Court of Appeals, fifth circuit, which became the law of the case in the accounting for rents and profits, etc. (See 72 Fed. Rep., p. 712):

"The Circuit Court having decreed that the defendants were entitled to restitution on condition, which decree was not fully executed because the condition was not met, and having decreed a foreclosure and sale of the property will, of course, have an account taken of the proper receipts and disbursements incident to the cus-

tody and operation of the mortgaged property and of the rents and profits *earned, or that should have been earned*, since its delivery to the purchasers under the former sale, and make such further orders, etc."

ORDER OF REFERENCE TO SPECIAL MASTER (IN CONFORMITY):

It is ordered that this case be referred to Thomas B. Felder, Esq., for the purpose of "taking an accounting of the proper receipts and disbursements incident to the custody and operation of the mortgaged property, and of the rents and profits *earned, or that should have been earned*, since its delivery to the purchasers under the former sale; and to ascertain whether there has been any conversion of the property connected with said property, and the amount and value of the same; as to whether there has been any waste or damage to the property, and as to whether the same is the result of ordinary wear and tear; and as to the liability of the holders of the property therefor."

This March 16, 1896.

(See condensed printed record (on application for *certiorari*), p. 69).

Referring to the rule of liability or diligence as expressly set forth in the orders quoted on preceding page, both of the Circuit Court of Appeals, fifth circuit, and also of Judge Newman, in conformity, it should be noted that Mr. Justice McCormick, who wrote the opinion in the Court of Appeals, employed the following significant and strong language in the same connection:

"This property was a large and going factory, for the manufacture of cotton goods, employing many operatives, carrying a considerable stock of "Quick Assets," *requiring competent, careful, and responsible handling.*"

72 Fed. Rep. 708.

So excellent an authority as Snell's Equity (American Notes by Lawson), define the terms, as follows: "Gross and wilful negligence"—tantamount to "*Fraud.*"

See Hewitt *v.* Loosemore, 9 Hare, 458.

"If there be 'Wilful default or gross neglect' as to making repairs, the mortgagee is accountable. Need not show actual '*Fraud.*'"

Russell *v.* Southard, 12 How. (U. S.) 139.

2 Halst. Ch. (N. J.) 557.

In Hughes *v.* Williams, 12 Vesey, Jr., 493, it is said:

"Mortgagee in possession, though answerable, beyond fraud, for *wilful default*, is to take the fair rents and profits, not bound to engage in, and will not be allowed for speculation and adventure."

In the note to this case, it is said:

"By taking possession, the mortgagee imposes upon himself the duty of a 'Provident Owner,' and he is bound to recover what such an owner would, with 'Reasonable Diligence,' have received."

Again:

"A mortgagee personally in possession is responsible for 'reasonable' rent," citing:

Bainbridge *v.* Owen, 2 J. J. Marsh, 465.

The Lord Chancellor (Erskine) stated as follows:

"I do not mean to say that, to charge a mortgagee in possession, '*actual fraud*' is necessary. It *is sufficient*, if there is *plain*, *obvious*, and *gross* negligence, by not making use of facts within his knowledge, so as to give the mortgagor the *full benefit* that the mortgagee, in possession of the estate of the mortgagor, ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and having notice that the estate was underlet, takes a new tenant, another person offering more. * * * I agree to the principle that has been stated by the Attorney-General, that it would be dangerous to say the mortgagee is not answerable except for *fraud*, and it would contradict many decrees, etc."

In Hilliard on Mortgages, pp. 418–9, it is said:

"If the mortgagee himself occupies he is accountable for the *utmost* value the land would have produced, with ordinary care, exclusive of taxes and repairs; but if he enters into receipt of the rents, only after the rate of the rent reserved."

So, also, in Lord Trimleston *v.* Hamill, Ball & Betty's Ch. Rep., Vol. 1, p. 175, it is held:

"If the mortgagee enter into possession of the lands, he must account at their *utmost* value; he is always charged with the *utmost* value they are proved to be worth, etc."

It is clear from the tone of the report and the rulings of the master that he did not use the terms as indicating a mere want of ordinary

care and diligence, but used it in the sense of "fraud"—that the accounting parties were liable for only what they "actually earned" instead of what they "should have earned," because they had been guilty of no fraud.

The master, in his report, shows what he meant by "wilful default."

In disposing of two claims involving over $150,000.00, to wit, overcharges on cotton bought and undervaluation of goods sold, he says (Rec., p. 95):

"Indeed, in regard to the claim of overvaluation of cotton bought, and undervaluation of goods sold, the undersigned thinks that the movant must stand by the actual results until he can show that those results are materially different from what they should have been, and that they were brought about intentionally *or by neglect so gross as to amount to wilful default.*"

Conclusive and overwhelming proof was adduced before the master that the prices charged for cotton used in the mill were above the market price, and the prices realized for the sale of the product were below the market price.

The record of this mill, in the hands of its previous owners, and the testimony of five experts, showed that this mill had averaged for a period of years and ought to have earned at least $40,000 per annum.

All of this testimony was ignored by the master on the ground that there had been no "wilful default," or, as he defined it, no "negligence so gross as to amount to wilful default."

XVI.

The deduction by the master of $4,654.60, *with* $469.72 *of interest thereon, from the aggregate allowed petitioners, as a net "loss shown by books" of Galeton Cotton Mills during their operation of petitioners' property for three and two-thirds years, was absolutely without warrant of law or fact to support it. This error was specially assigned as one of the exceptions to the master's report in the lower court, but the exception was overruled without consideration thereof by the court. It was again specially assigned as error in the Circuit Court of Appeals, and was there again ignored by the court, which amounted to a denial of justice by said court.*

The above proposition proves itself when it is remembered, first, that the books of the Galeton Mills were not in evidence; second,

that the testimony of Lanier as to what the books not in evidence showed on this point, was based on a statement made up from these excluded books, not by himself, but by somebody else; third, that respondents could not be made to pay a sum claimed to have been lost by the mortgagees in the operation of the mill.

An inspection of the opinion of the Circuit Court shows that the exception on this point to the master's report was ignored. The Circuit Court of Appeals did likewise.

XVII.

The only justification in law or equity which the courts below could bring forward for the refusal to stay the sale of defendants' property until an accounting could be had for rents and profits, and for confirming said sale when made, was that the rents and profits belonged to the Huguley Manufacturing Company and were not applicable to the payment of the mortgage debt, for which that company was not personally bound. Therefore, after having refused to postpone the sale, and after confirming it when made, it was error for the court to apply the amount found in favor of the Huguley Manufacturing Company for rents and profits to the satisfaction of an alleged balance on a decree rendered only against The Alabama and Georgia Manufacturing Company.

This proposition is self-evident. If there were no right or equity to stop this sale until it could be sold only for the amount actually due on the mortgage, by the application thereto of the amounts due by the holders of the mortgage bonds for years of rents and profits of the mortgaged property, then such want of right or equity could arise only out of the fact that the Huguley Manufacturing Company, who was not personally bound for the mortgage debt, against whom no decree had been sought or rendered for the debt, was the sole owner of such rents and revenues, and that they were not applicable to the payment of the mortgage debt.

One or the other horn of the dilemma must point the truth.

If the rents and profits were applicable to the mortgage debt, then it was a gross wrong and inequity to sacrifice defendants' property under a decree for more than was due on the mortgage.

If the rents and profits were not applicable to the mortgage, then it was proper for the court to refuse to stay and to confirm the sale, but it was wrong and inequitable to apply rents and revenues to the payment of the deficiency due on the mortgage after the sale, under a personal decree against the other party defendant.

XVIII.

The Huguley Manufacturing Company, having been made a party defendant only to bar its equity in the mortgaged property, and no other decree of any kind having been entered against it, and having prevailed in its application for an accounting for the rents and profits, it was contrary to the principles of right and equity to decree against it all the costs and fees of the reference on which the accounting was had, and other costs of the cause, amounting to $4,132.00. *The action of the lower court in this regard was purely arbitrary, and was without any assigned cause or reason, and the refusal of the Circuit Court of Appeals to notice this specially assigned error amounted to a denial of justice.*

While it is true, as a general rule, that costs in equity are discretionary with the chancellor, yet "discretion is a science not to act arbitrarily." (Rock's Case, 5 Rep. 99, b.; Burgess *v.* Wheate, 1 W. Black. R., p. 123). They generally follow the decree, and "the unsuccessful party must show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails."

2 Dan. Ch. Pr. (5th Ed.) 1381.

Beach Mod. Eq. Pr., Sec. 1004.

No ground was shown in the lower court why the accountants who resisted the demand for an accounting, who contested the items of their liability, who were adjudged liable to account, and against whom a large amount was found, should not pay the costs incurred in bringing them to justice.

XIX.

The decree of October 15, 1898, was grossly erroneous.

(*a*) *It permitted the purchasers to set up as the ground for non-compliance with the decree of confirmation entered two years and five months before, the very ground which defendants in vain urged as a reason why the sale should not be confirmed.*

We suggested in a previous paragraph of this brief that there was more than one instance on this record where the court had "blown both hot and cold" as to rights of these petitioners.

At the time petitioners were pleading for a postponement of the

sale, and resisting its confirmation, they set up the pending reference as to rents and profits as the ground and reason why the sale should be postponed and why it should not be confirmed when made.

The court adjudged this ground invalid for the purpose, ordered the sale and confirmed it when made.

Two years and five months later the very persons who had urged the sale and its confirmation, and had induced the court to hold that the ground set up was not valid, came back to the court and *set up this very ground as a reason why they had not complied with the order of confirmation;* and asked for essential modifications and changes in the decree of confirmation. Against the earnest opposition of petitioner the court maintained their petition.

Their assignment of errors on this matter said (Rec., p. 59):

"Appellants insist that if the pendency of said reference and absence of a report were not a valid ground, why the sale should not be confirmed, it is not a valid excuse for failing to comply with its terms, and that the court, therefore, erred either in overruling the said objections to confirmation or in holding said excuse to be valid."

Where is there any possible escape from one or the other of these propositions?

Were not the petitioners entitled to have an answer to their cry for relief from these judgments, or from one or the other of them?

Did they not involve the question of the divestiture of their title to a valuable property?

We confidently know that this court will heed our cry and give us relief.

(b) *It deprived the defendants, the Huguley Manufacturing Company, of the rents and profits of its property, possession of which had been detained by the purchasers, not only for the three years and eight months from September* 6, 1892, *to May* 6, 1896, *for said two years and five months from May* 6, 1896, *up to October* 15, 1898 *(over six years), without title, and without having complied with the terms of their purchase, and arbitrarily fixed the liability of the purchasers during that period at seven per cent. per annum interest on the balance due as the purchase price, in contravention of the jurisprudence of the circuit and of this court.*

In Chicago and Vincennes R.R. Co. *v.* Fosdick, 106 U.S. 71, this court said:

"It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption."

Full compliance with the terms of the sale by the purchaser is necessary to entitle him to the deed. Until he so complies the purchase is inchoate and incomplete. The order of confirmation consists essentially of two parts: first, the approval of the court of the price bid at the sale; second, an authorization to the master to receive compliance with the bid from the purchaser to and to make him a deed. Such was the order in this case (Rec., p. 81):

"It is ordered, adjudged and decreed that said sale be and the same is hereby confirmed in all respects, and that Samuel C. Dunlap, as such commissioner, be, and he is hereby authorized and directed to convey to said purchasers all and singular the property and the property rights of every description described in said decree, *upon the purchasers complying with the terms of said sale.*"

Appellants repeat and insist that rents accruing between the day of sale and the delivery of the deed belong to the owner of the equity of redemption.

Clason *v.* Corley, 5 Sandf. 447.
Astor *v.* Turner, 11 Paige, 436.
Mitchell *v.* Bartlett, 52 Barb. 319.
2 Daniell's Ch. Prac., Sec. 1277, Note.
Jones on Mtgs., Sec. 1659.
Taliaferro *v.* Gay, 78 Ky. 496–7.
Rorer on Jud. Sales, p. 387, and cases cited.
Cheney *v.* Woodruff, 45 N. Y. 98, and cases cited by Mr. Justice Peckham, who, in the opinion, held:

"But what right had the plaintiff to this rent? He had not possession of the premises until after this term had expired, nor had he any right to such possession."
Brown *v.* Frost, 10 Paige, 247.
Rule 72, Supreme Court.

"He had not paid all the purchase money; he had no deed; until he received that, he had no title under a mortgage foreclosure, so as to claim any rent, and his claim, when he did receive the deed, was *prospective.*"
Astor *v.* Turner, 11 Paige, 436.
Strong *v.* Dollner, 2 Sandf. S. C. 447.
Clason *v.* Corley, 5 *id.* 447.
Mitchell *v.* Bartlett, 52 Barb. 319.

"As to the right to rent, it is of no moment whether the money had been paid or not, or whether the purchase-money was or was not upon interest. Such questions are all settled by the bidding, by the terms of sale; and the bids are regulated accordingly."

As pointed out, *supra*, we repeat that the very question presented by this record on this point was decided in the Circuit Court of Appeals for the fifth circuit, a year before this case was decided, in two very important cases, where large sums were involved—the revenues of a railroad. Boyle *v.* Farmers' Loan and Trust Company, and Huntington *v.* Same, 88 Fed. Rep. 930 C. C. A., Vol. 32, p. 142.

In those cases the court said:

"Neither in law, nor in equity, is the purchaser under the foreclosure entitled to the earnings of the property since the decree of confirmation, because, among other things, *he has persistently delayed complying with his bid.*"

Ought not the petitioners in this cause to have received the same measure of justice that was meted out in those cases?

Suppose the lower court in those cases had given the revenues to the delaying purchaser from the date of the bid, and had arbitrarily directed the purchaser, in lieu of surrendering revenues, to pay 7 per cent. interest on the amount of his bid from the date of the confirmation, would not the Circuit Court of Appeals have been compelled to reverse that judgment?

Were they not, therefore, compelled to reverse the judgment in this case?

Was not the rent of this large and valuable mill for over six years a real and substantial issue on which the petitioners were entitled to have a hearing, and entitled to have decided according to the jurisprudence of this court and of the very court to which appeal was made?

(c) *It permitted the purchasers to credit on their bid the ten thousand dollars, with interest from the date of the first to the date of the second sale, paid in on account of the first sale, which had been distributed in the payment of debts and claims for which neither defendants nor their property were liable, full provision having been made for all these debts and claims in the final decree by adjudging in favor of defendants that* $4,102.50 *thereof should be paid by the bondholders themselves, and that the bondholders who had received the balance of the ten thousand dollars should receive no dividend*

on these bonds until the payers of the money into court should be reimbursed the amount received on the bonds.

The purchasers at the second sale were not entitled to the deduction of the ten thousand dollars paid in at the first sale.

That sum had been disbursed in paying partly their own debts, decreed against them in the final decree of June 4, 1898 (Rec., p. 137), being the costs of the first sale amounting to $4,102.50, and partly the bonds of Mrs. Huguley, specially excluded from the benefits of the final decree of foreclosure. Full provision was made in the decree of June 4, 1898, as to these bonds and the payment thereon. See paragraph 8 of the decree. (Rec., p. 138.)

The effect of this decree of October 15, 1898, was to reverse the decree of June 4th, and to make the petitioners' property bear the burden of the costs which had been adjudged in their favor.

(*d*) *It diminished the price of the sale by relieving the property from liens in addition to the price bid, laid upon it in favor of the Huguley Manufacturing Company by order of the confirmation of which liens were thereby taken off the property and charged against and made payable out of the price.*

The decree of confirmation of the sale declared a lien in favor of the Huguley Manufacturing Company on the property in the hands of the purchasers, for any amount found by the master in excess of the deficiency due by the defendants to complainants in the foreclosure proceedings.

This portion of the decree of confirmation was supposed to be a sop to the Huguley Manufacturing Company in compensation for the court's refusing to maintain its objection to the confirmation of the sale.

The purchasers, by accepting that decree of confirmation, took it in all its parts and agreed to pay the price bid, $66,000, *and in addition to that any other sum that might be found due on the pending reference.*

In their quality of purchasers only, Lanier and his associates had no interest in the pending reference.

Central Trust Company *v.* Grant Locomotive Works, 135 U. S., p. 207.

Swann *v.* Wright's Executor, 110 U. S. 590.

Compton *v.* Jesup, 167 U. S., pp. 1–35.

If the amount found due on that reference had been $228,000,

claimed by the Huguley Manufacturing Company as having been proven in their favor up to May 6, 1896, it would still have been a lien on that property in the hands of the purchasers.

That provision in the decree was intended to give security to the Huguley Manufacturing Company for the claim it was then and is still litigating.

In addition to the sum for rents and revenues there was also found by the master, in favor of that company, a judgment for $2,500, with $894.04 interest, for property of that company taken possession of and converted by the purchasers. The court in the final decree of June 4, 1898 (Rec., p. 138), refused to set off this sum (less $750 costs) against the mortgage debt, and declared a lien on the property therefor in the hands of the purchaser. The proceeds of the sale which belonged to defendant's debtors, the mortgage creditors, could not be used to pay this debt. It was to be paid by the purchaser in addition to his bid. The court ordered the lien for this sum to wiped off the property in the hands of the purchaser and the amount thereof to be paid out of the purchase price, paid into the court. (See amendment to decree, Rec., p. 154.) It ordered all the claims of the Huguley Manufacturing Company to be transferred from the property to the fund in court, and permitted the purchaser to pay into court only $43,433.36, with 7 per cent. from May 6,1896,when the amount that ought to have been paid in to release the property (leaving out of view entirely the litigated claims for rents and profit) was $66,000, as of date May 6, 1896, with interest aggregating $77,515.54, which, together with the special award for supplies and findings (confiscated and converted by the Galeton Cotton Mills), valued at $3,658.07, principal and interest, decreed in favor of the Huguley Manufacturing Company, making a total sum of $81,173.61. It thus gave the purchasers an unencumbered title to the property for $48,433.36, with interest on $43,433.36 from May 6, 1896, when on the face of the papers they had agreed to pay a minimum of $81,173.61, *in bonds*, and *to hold the property subject to any further sum the Huguley Manufacturing Company might be awarded under the pending reference.* (See Assignment of Error XLVIII.) And this upon the assumption that the pretended sale of May 6, 1896, was a valid sale, which appellants deny, insisting that it was absolutely void for non-compliance with its express terms.

(c) *It subordinated the lien of the claim of the Huguley Manufacturing Company to the lien of the claims of the solicitors of the*

bondholders for service performed in their behalf, who, by the final decree, were given a lien only as against such bondholders, and directed payment to them of $7,000 *out of the funds paid in by the purchaser, thereby diminishing to that extent the security of the Huguley Manufacturing Company, under the same decree which relieved the property of their lien and referred it to the fund so paid in.*

See final decree, page 137, making the solicitors' fees of Dorsey, Brewster & Howell a lien only as between the bondholders. See decree on petition of Lanier for absolute deed, page 149, which orders the clerk to pay these gentlemen immediately out of the fund in court, $7,000, "the same having been by a previous decree of this court adjudged to be prior liens on said proceeds *in preference to all other claims.*" To this fund, thus diminished by the payment of the personal debt of the bondholders, the claims of the Huguley Manufacturing Company are referred.

And yet this same court, in its very first opinion ever rendered in this case, had held as follows:

"There is nothing whatever in this contract, as has been stated, providing that counsel fees of complainant should be paid in the event of a foreclosure in court, and if the same should be taxed here against the defendant, it would be increasing the amount of the mortgage to that extent in the absence of a provision in this trust deed for counsel fees, and the law requiring it to be taxed it would be placing the burden on the purchasers of the property (Huguley Company), which they did not assume and cannot be held to have assumed when they bought the property at the receiver's sale.

"The conclusion is that this is not a case where the court is required by law to tax counsel fees of the complainant, the defendant, and in the absence of any such requirement, and considering the question under the general rule applicable in courts of equity, such a case is not made, as the court would, in its discretion, give it that direction."

XX.

As to the character of the proceedings instituted in the Chancery Court of Alabama, and petition pending in this Court for Writ of Prohibition, Mandamus v. the Judge of the Circuit Court of the United States for the Northern District of Georgia, for enjoining same.

At the hearing upon oral argument, it was suggested that certain "auxiliary" proceedings had been instituted in Alabama.

Counsel for appellants (Senator Morgan) inadvertently explained the proceeding referred to as being one for "foreclosure." This was error. By way of enlightening the court—since the question was propounded—we merely now take the liberty of quoting the initial paragraph of that petition, as follows:

"Your petitioners, The Huguley Manufacturing Company, a corporation chartered and organized under the laws of the State of Alabama, and the Alabama and Georgia Manufacturing Company, a corporation chartered by Act No. 183, of the legislative acts of the State of Alabama, approved February 7, 1866, and duly organized and operated thereunder, respectfully state unto your Honors, as follows:

I. "That they are the complainants in a suit brought in the Chancery Court of the First District of the Northeastern Division of Alabama, for the purpose of *redeeming* certain property—a Cotton Duck Manufacturing Plant—from the West Point Manufacturing Company, the Galeton Cotton Mills, and the Riverdale Cotton Mills, *each* a corporation under the laws of the State of *Alabama*, and from J. J. Robinson, trustee, a citizen of the State of Alabama, which said defendant corporations are holding said property as mortgagees in possession, etc."

II. "Your petitioners further represent that they are not parties, and never have been made or served as parties to any litigation had or pending in the Circuit Court of the United States for the Northern District of Georgia, but that, notwithstanding this fact, they were served in Alabama with what purported to be process from the said Circuit Court of the United States for the Northern District of Georgia, and compelled to appear before the said court on pretended "ancillary" proceedings, based upon a previous suit which was no longer pending, and in which a decree had been rendered and fully executed for the foreclosure of the mortgage, under which redemption was sought in *Alabama* as to property *lying wholly within the State of Alabama, and from Alabama corporations*, etc., etc."

(The entire cotton mill plant having been assigned and quit-claimed by W. H. Huguley & Co. to the Huguley Manufacturing Company, of *Alabama*, as their subscription to the capital stock of said Huguley Manufacturing Company).

[See Transcript of Record on Petition for Prohibition, Mandamus, etc., pp. 1–67, and particularly petition therefor on the first nine pages of same, which presents the whole case in Alabama and Atlanta.]

For greater particularity, appellants respectfully invite the usual

careful examination by the court of the first nine pages of the petition, and of the record (only 67 pages), and the briefs of counsel filed in this connection, all of which are self-explanatory.

From these it will be observed that the suit so brought in Alabama is *not* an "auxiliary" suit, nor one of "foreclosure," but an *independent* action for "*redemption*," instituted by the owners of the equity of redemption, which said suit is now before the Supreme Court in an *independent* action to which reference is made for the record showing the facts.

XXI.

It has also been loosely suggested that the question of "jurisdiction" was only first raised in the original application filed by appellants for *certiorari*. The record, on the contrary, shows on its face that the question was expressly raised, on demurrer, by Hon. N. J. Hammond, solicitor for the Huguley Manufacturing Company, at the very outset of the case in the original circuit court.

Part I, pp. 11–12.

It is also shown on the face of the last record certified up on this appeal from the Circuit Court of Appeals, that the question of not only jurisdiction of the "*parties*," but jurisdiction of the "*subject-matter*," were both distinctly passed upon by the Circuit Court of Appeals, which, in its opinion (by Shelby, Judge) last rendered in this cause, from which the present appeal was taken and allowed, held as follows:

"1. The possession of the purchasers at the first foreclosure sale was not wrongful in the sense that such possession made them trespassers. **The decree was rendered by a Court having jurisdiction of the case.** The mortgage foreclosed was valid. The decree was binding and not subject to collateral attack. It was valid and effectual to place the purchasers in possession and to protect them in possession till it was reversed.

2 Jones on Mortgages, (5th Ed.), Secs. 1587, 1588.

"It was reversed by this court, and the circuit court then granted an order of restitution, but upon condition that the Huguley Manufacturing Company would pay into court the sum of $10,000.00 which had been paid by the purchasers at the date of their purchase.

"This court, on appeal, affirmed this condition, The Huguley Manufacturing Company did not pay the $10,000.00 and so were

not entitled to the possession by the terms of the order made by the circuit court and affirmed by this court. From its inception the possession in question was sanctioned by a decree of the court **having jurisdiction of the parties and the property."**

Record on Last Appeal, Part III, page 106 (yellow cover).

Therefore, in view of this question of "jurisdiction" not only of "*subject-matter*," but of "*parties*" having been *twice* raised and *formally* passed upon, first, in the trial Circuit Court, and latterly in the Circuit Court of Appeals, appellants now are clearly entitled in this court to assign as errors on the face of said record the respective rulings of the lower courts upon so vital a question.

The consideration of this Honorable Court upon this grave issue is now respectfully and earnestly invoked by these appellants.

XXII.

Conclusion.

In this case, therefore, the decree should be reversed, and the ne proceedings be held illegal.

If the court should agree with us that the case is one of which ne court had no jurisdiction, it should be ordered dismissed.

In event of any doubt as to jurisdictional facts, the decree ould be reversed and a hearing thereon ordered.

If not, the decree of foreclosure should be annulled and the sale t aside.

And then the party in possession who has been adjudged to represent the bondholders, should account as a mortgagee in possesion for all profits to date, and the mortgagee be permitted to pay ay balance due on the mortgage, discharge it and recover its propty.

If the court deems its jurisdiction on appeal doubtful, it now has e record before it. While the *certiorari* may have been based on appeal, it is at last merely a means of bringing up the record. orm is immaterial in this regard.

The writ of *certiorari* does not give this court jurisdiction; it is ly the process to get the record, and the record is now here perted by means of the writ of *certiorari*.

In re Chetwood, 165 *U. S.* 443, 462.

The court will therefore pass upon the merits of the case regardless of whether the case could come by appeal or should be brought up by *certiorari*.

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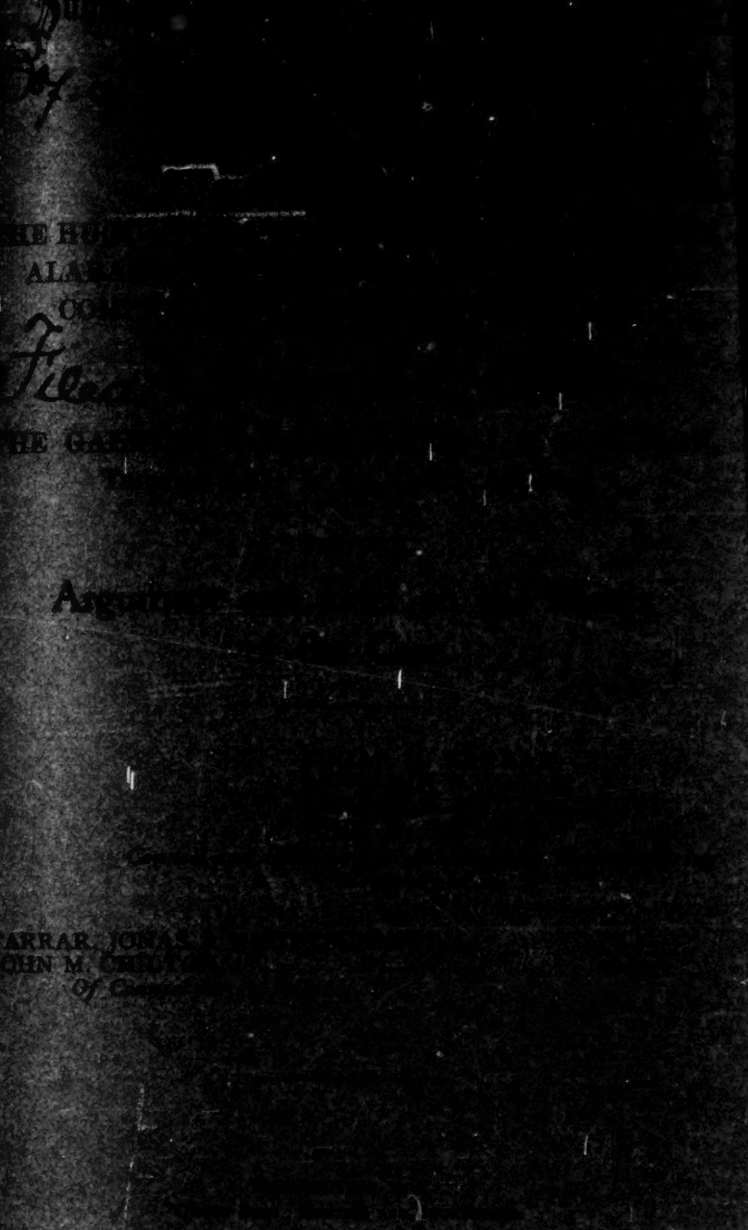

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tion to decree any sale of said property, and the sales made pursuant to its decrees were absolutely null and void; and Robinson and Lanier, who were stockholders and directors in the Alabama and Georgia Manufacturing Company (Lanier having instigated the suit and secured the appointment of said receiver by the State court), were guilty of contempt of the State court for interfering and bringing this bill in the Federal court 34–35

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(over six years), without title, and without having complied with the terms of their purchase, and arbitrarily fixed the liability of the purchasers during that period at 7 per cent. per annum interest on the balance due as the purchase price, in contravention of the jurisprudence of the Circuit and of this court..... 64

(c) It permitted the purchasers to credit on their bid the ten thousand dollars, with interest from the date of the first to the date of the second sale, paid in on account of the first sale, which had been distributed in the payment of debts and claims for which neither defendants nor their property were liable, full provision having been made for all these debts and claims in the final decree by adjudging in favor of defendants that $4,102.50 thereof should be paid by the bondholders themselves, and that the bondholders who had received the balance of the ten thousand dollars should receive no dividend on these bonds until the payers of the money into court should be reimbursed the amount received on the bonds..... 66

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The Huguley Manufacturing Company, having been made a party defendant only to bar its equity in the mortgaged property, and no other decree of any kind having been entered against it, and having prevailed in its application for an accounting for the rents and profits, it was contrary to the principles of right and equity to decree against it all the costs and fees of the reference on which the accounting was had, and other costs of the cause, amounting to $4,132. The action of the lower court in this regard was purely arbitrary, and was without any assigned cause or reason, and the refusal of the Circuit Court of Appeals to notice this specially assigned error amounted to a denial of justice..... 70

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The refusal of the Circuit Court of Appeals to consider this specially assigned error amounted to a denial of justice by said court..... 79

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The master's interpretation of the rule of responsibility of a mortgagee in possession, holding that "wilful default," meant fraud or wanton misconduct, and not "ordinary and reasonable diligence," was apparent in all of his findings. This was the gravamen of petitioners' exceptions in the court below, and was the complaint in the Circuit Court of Appeals. The Circuit Court of Appeals misinterpreted and misconstrued the position of appellants, and decided this point upon the ground that the appellants wished to apply to the complainants some other or different or stricter rule than that of a mortgagee in possession. This action of the master and the court resulted in the rejection of claims of petitioners exceeding $190,000. 86–87

XXII.

Exceptions to report of master and assignments of error quoted, showing:

(*a*) Overcharge on cotton, $50,359.52;

(*b*) Cotton converted and unaccounted for, $10,338.32;

(*c*) Deficit or under-return on sales of duck, $101, 537.71.

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XXIII.

The deduction by the master of $4,654.60, with $469.72 of interest thereon, from the aggregate allowed petitioners ($44,367.66), as a net "loss shown by books" of Galeton Cotton Mills during their operation of petitioners' property for three and two-thirds years, was absolutely without warrant of law or fact to support it. This error was specially assigned as one of the exceptions to the master's report in the lower court, but the exception was overruled without consideration thereof by the court. It was again specially assigned as error in the Circuit Court of Appeals and was there again ignored by the court, which amounted to a denial of justice by said court..... 99

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The record on its face shows that the cost of this property was $350,000.00, its insurable value $250,000.00, and net earnings of the mill, covering a period of ten years immediately preceding its surrender to incumbents had, under the Huguley management, earned net profits of over $40,000.00 per annum, average, and for the period of accounting taken up to May 6, 1896, "should have earned," according to the evidence adduced by numerous expert witnesses for the Huguley Manufacturing Company, the sum of $228,000.00..... ... 100

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Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, AND WILLIAM T. HUGULEY, *Appellants*,

versus

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER, *Appellees.*

ARGUMENT AND BRIEF ON THE MERITS OF THE CASE.

EDGAR H. FARRAR,
BENJAMIN F. JONAS,
ERNEST B. KRUTTSCHNITT,
JOHN M. CHILTON,
Counsel and Solicitors for the Huguley Manufacturing Company et al.

The statement of the case has been so fully made in the briefs of associate counsel, assignments of error, and in the oral argument of leading counsel, Hon. John T. Morgan, that we do not deem it necessary to repeat it here.

The proceedings attacked in this application have been continuous, were finally closed by the decree of the Cir-

cuit Court of Appeals by its judgment and decree of May 16, 1899, and are all contained in the record brought up.

I.

The Supreme Court of the United States—even if under the Act of 1891 *it had no jurisdiction on appeal—now that it has authorized and required by* **certiorari**, *the record in this cause to be certified to it for its review and determination*, **has the same power and authority in the case as if it had been brought up from the Circuit Court of Appeals by appeal or writ of error.**

The appellees in this cause contend that the Supreme Court of the United States is without jurisdiction to entertain or consider the merits of this cause, on the alleged ground that because Robinson, Trustee, as plaintiff in the original bill, was a citizen of Alabama, and according to *his* method of aligning the parties, the defendant mortgagor corporation, the Alabama and Georgia Manufacturing Company, and the Huguley Manufacturing Company, the owner of the equity of redemption, were each alleged to be corporations "created under the laws of Georgia," and W. T. Huguley was "a citizen of said State of Georgia"—this, therefore, presented a sufficient *prima facie* case of "diverse citizenship" as to make the judgment of the Circuit Court of Appeals final under the statute of 1891, which provides: "And the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States."

Appellees overlook the further plain provision of the statute, which recites: "And *excepting always* that, in any

such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, *by certiorari or otherwise*, any such case to be certified to the Supreme Court *for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*"

This last saving clause is so clear, so explicit, as to leave no room for uncertainty or for challenging the jurisdiction of the Supreme Court which, after deliberately weighing the facts in the cause has, by its very consent and authorization, sanctioned our bringing up the complete record in the cause, and having so formally signified its acquiescence, and the record having been brought up, printed, submitted, and received, the Supreme Court undoubtedly has now the full record before it "for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

In support of this proposition we cite:

Forsyth *v.* Hammond, 166 U. S. 506.

American Construction Co. *v.* Jacksonville, Tampa & Key West Railway, 148 U. S. 372, 383.

"The Three Friends," 166 U. S. 1.

In re Chetwood, Petitioner, 165 U. S. 443, 462.

Panama Railroad Company *v.* Napier Shipping Company, 166 U. S. 280.

Under the principles declared by this court in the case of the Panama Railroad Company *v.* Napier Shipping Company, 166 U. S., p. 280, the writ brings up the whole case for examination.

In that case, the Circuit Court of Appeals, in February, 1892, on an appeal from the Circuit Court, reversed its decree below and entered a decree in favor of the Napier

Shipping Company, declaring the Panama Railroad Company liable, and remanded the case to ascertain the damages. The District Court found the damages and entered a decree therefor. On the second appeal, taken by the Panama Railroad Company, the Circuit Court of Appeals, in April, 1894, affirmed the judgment of the District Court.

On *certiorari* thereafter taken, this court held that "while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when in the exercise of its supervisory jurisdiction it issues a writ of *certiorari* to bring up the whole record. Upon such writ the entire case is before us for examination."

The judgment of this court reversed all the decrees on the record against the Panama Railroad and reinstated the original decree of the District Court in its favor, entered in July, 1891.

The allowance of an appeal removes the case into the Appellate Court in virtue of a right that cannot be denied arbitrarily. Mandamus will lie to enforce it.

Ex parte Jordan, 94 U. S. 248.

The appeal in this case from the decree of the Circuit Court of Appeals and the appeal on which that decree is based were allowed without restriction, and present the whole case on both records for review by the Supreme Court.

Chappell *v.* The United States, 160 U. S. 499.

The allowance of an appeal from the judgment of the Circuit Court of Appeals places the record of that court and the record that supports it in the Supreme Court, and all mandates in cases appealed to the Supreme Court from the

Circuit Court of Appeals are sent directly to the Circuit Courts in which the case originated under the statute.

Texas Pacific Railway *v.* Anderson, 149 U. S. 239.

In Buckingham *v.* McLean, 13 How. 150, it is said in the head notes:

"An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant, including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court."

And in the *opinion*, "the record appeal was regularly taken and perfected. By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants."

In Chappell *v.* United States (decided January 6, 1896), 160 U. S. 499, it is held:

"Upon a writ of error under the Act of March 3, 1891, c. 517, §5, in a case in which the constitutionality of a law of the United States was *drawn in question*, this court has power to dispose of the whole case, including *all* questions, whether of *jurisdiction* or of *merits*."

Opinion by Mr. Justice Gray:

"* * * But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed, *without restriction or qualification*, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional

question, but of the *entire* case, including *all* questions, whether of *jurisdiction* or of *merits*."

Nishimura Ekiu *v.* United States, 142 U. S. 651.
Horner *v.* United States, 143 U. S. 570, 577.
United States *v.* Jahn, 155 U. S. 109, 112, 113.

Mr. Chief Justice Fuller ("*in re* Chetwood"), and Mr. Justice Brewer (*in re* "Forsyth *v.* Hammond"), have reviewed so exhaustively and determined so definitely the important issue involved upon this question of the power and practice of the Supreme Court to issue the writ of *certiorari*, that, because appellees seem to rely upon working our defeat through such *technical* point of *practice* rather than upon the *merits* and *equities* of the cause, we may be pardoned for here quoting freely from these two pivotal decisions which have finally settled that the *jurisdiction* of the Supreme Court to hear and determine this cause by appeal, or on *certiorari*, or otherwise, and to reach all the decrees in the case in the Circuit Court, or in the Circuit Court of Appeals, is complete, plenary and supreme.

In re Chetwood, petitioner, 165 U. S. 443, 462, decided February 5, 1897, the head notes read:

"A writ of error from this court removes a cause from a Circuit Court to this court, and it is then for this court to determine whether it may entertain jurisdiction of the cause removed, and to dispose of controversies in respect of the *form* of the writ, the parties, and the citation and service, without interference from any other court." * * *

"This court may issue writs of *certiorari* in all proper cases, and will do so when the circumstances imperatively demand that form of interposition, *to correct excesses of jurisdiction, and in furtherance of justice.*"

In the opinion of the court, Mr. Chief Justice Fuller held as follows:

"As in our opinion, the Circuit Court exceeded its jurisdiction in thus proceeding, we are constrained to make the rule absolute."

"By section 14 of the Judiciary act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;" and under this provision, we can undoubtedly issue writs of *certiorari* in all proper cases.

Amer. Construction Co. *v.* Jacksonville Railway, 148 U. S. 372, 380.

"And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that *form* of interposition, the writ may be allowed, as at common law, *to correct excesses of jurisdiction and in furtherance of justice.*"

Tidd's Practice, *398; Bac. Ab.,—*certiorari.*

In Forsyth *v.* Hammond, 166 U. S. 506 (decided April 19, 1897), it is held in the head notes as follows:

"Under the judiciary act of March 3, 1891, c. 517, the power of this court in *certiorari* extends to every case pending in the Circuit Courts of Appeals and may be exercised at any time during such pendency, provided the case is one which, *but for this provision of the statute*, would be finally determined in that court."

"While this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the Courts of Appeal, it is a power

which will be sparingly exercised, and only when the circumstances of the case satisfy this court that the importance of the question involved, **the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State**, or some matter affecting the interests of the nation in its internal or external relations, demands such exercise."

"As in the contests between the parties to this suit, the Circuit Court of Appeals for the Seventh Circuit, and the Supreme Court of the State of Indiana had reached opposite conclusions as to their respective rights, and as all the unfortunate possibilities of conflict and collision which might arise from these adverse decisions were suggested when this application for *certiorari* was made, it seemed to this court that although no final decree had been entered, it was its duty to bring the case and the questions here for examination at the earliest possible moment."

Mr. Justice Brewer, in the opinion (pp. 513–4), held as follows:

"This question of power (to issue writ of *certiorari*) has, indeed, already been decided by this court in prior cases:

American Construction Company *v.* Jacksonville, Tampa, etc., Railway Company, 148 U. S. 372, 383.

"The Three Friends," 166 U. S. 1.

[Here follows history and purpose of act of 1891, when the court resumes:]

"It was obvious that all contingencies in which a decision of this tribunal was of importance could not be foreseen, and so there was placed in the act creating the Courts of Appeal, in addition to other provisions for review by this court, this enactment:

"And *excepting always* that, in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, *by certiorari or otherwise*, any such case to be certified to the Supreme Court for its review and determination, with the same

power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

"The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error. Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of *certiorari* and transfer the case here for review and determination."

"We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in *certiorari* extends to every case pending in the Circuit Court of Appeals, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of *avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the* **courts of a State**, or some matter affecting the interests of this nation in its internal or external relations demands such exercise.

Application of Foregoing Precedents to the Two Cases Pending in this Court as Certified from New Orleans, Alabama and Atlanta, Showing Gravity of Issues Now Involved.

Apropos of the concluding words of the foregoing extract from the opinion to the effect that the writ of *certiorari* will always be granted where there is or appears "the necessity of avoiding conflict between two or more Courts of Appeal, *or between Courts of Appeal and the courts of a State*," *etc.*, it was suggested at the hearing that there is now pending in this (the Supreme) court still another petition for writ of prohibition, mandamus, etc., against Judge Newman, of the Circuit Court of the United States for the Northern District of Georgia, and it was inquired whether the suit filed in the Chancery Court of Alabama, prosecution of which Judge Newman has enjoined, was in the nature of an "auxiliary" suit. It is respectfully suggested that, independently of all that is shown on the face of this present record on appeal fully justifying this court in having granted our *certiorari*, in receiving our record, and in considering the merits of the whole case, when this Honorable Court come to examine into the record certified up from Alabama and Atlanta, and read the record and several briefs on file in *that* connection (to all of which attention is earnestly invited), it will find itself confronted with identically the same situation and condition of antagonism as threatened or described in the cases cited *supra*, and that if such conflict be not already an accomplished fact, inevitably there must come in due course the very "conflict between Courts of Appeal and the courts of a State," which, it is conceded *supra*, the clause in the statute quoted has wisely and beneficently provided against. In brief, the suit instituted in Alabama is *not* an "auxiliary"

suit, but an *independent* action for **redemption and accounting,** etc.

We quote the first two paragraphs of the petition, but refer the court for greater particularity to the full record (only 67 pages), and especially to the first nine pages devoted to the petition, and to the several briefs of counsel filed along with said application, all of which are self-explanatory, and will serve to elucidate the true facts and conditions, if considered in conjunction with the merits of the case on this appeal. Although the court will note that the two suits are each independent the one of the other and with different parties and different subject-matter and wholly at variance as to the character and purpose of the respective actions. The petition *there* recites:

"Your petitioners, The Huguley Manufacturing Company, a corporation chartered and organized under the laws of the State of **Alabama** and the Alabama and Georgia Manufacturing Company, a corporation chartered by Act No. 183, of the legislative acts of the State of *Alabama* approved February 7, 1866, and duly organized and operated thereunder, respectfully state unto your Honors as follows:

I. "That they are the complainants in a suit, brought in the Chancery Court of the First District of the Northeastern Division of *Alabama*, for the purpose of *redeeming* certain property—a cotton duck manufacturing plant—from the West Point Manufacturing Company, the Galeton Cotton Mills, and the Riverdale Cotton Mills, *each* a corporation under the laws of the State of *Alabama*, and from J. J. Robinson, Trustee, a citizen of the State of *Alabama*, which said defendant corporations are holding said property as mortgagees in possession, etc.

II. "Your petitioners further represent that they are not parties, and never have been made or served as parties to any litigation had or pending in the Circuit Court of the

United States for the Northern District of Georgia, but that, notwithstanding this fact, they were served in *Alabama* with what purported to be process from the said Circuit Court of the United States for the Northern District of Georgia, and compelled to appear before the said court on pretended 'ancillary' proceedings, based upon a previous suit which was no longer pending, and in which a decree had been rendered and fully executed for a foreclosure of the mortgage, under which redemption was sought in *Alabama* as to property *lying wholly within the State of Alabama, and from Alabama corporations,* etc.

[The lands in Alabama on which were situated the entire cotton mill plant and village, having been assigned and quit-claimed by W. H. Huguley & Co. to The Huguley Manufacturing Company of Alabama in return for its capital stock.]

When it is considered that the suits now pending in this court present the case of a Federal district judge, in Georgia, disregarding the known fact that the trust estate of the Alabama and Georgia Manufacturing Company was already under the custody and protection of the State court, whose jurisdiction had first attached and which was still being continued, and the State court was still holding its prior liens over the mill plant and a large sum of cash and other property, and whose receiver had been expressly charged by mandatory order to pay promptly the interest, so as to avert the very thing that happened, a technical pretended "default"; and when it is further considered that notwithstanding this and the further fact which, from the answer and exhibits to the bill stood out equally as plainly and prominently, that every foot of this great factory property, lands, plant, village, etc., were all wholly within the State of *Alabama*, except possibly a few *worthless* islands, this court sitting in the Northern "*District*" of Georgia, whose process could not legally extend beyond the

State line, yet not only interfered with the jurisdiction previously attaching in and to the State court, but actually decreed and undertook to sell in Georgia, by its commissioner, this valuable property, shown and known to be situate in *Alabama;* and lastly, when it is considered that years after the execution of its *void* decrees under all these *void* proceedings had in said Federal District Court in Georgia, said court undertook, in face of Revised Statutes, Section 720, under pretended "ancillary" bill filed by an utter *stranger* to the record, claiming only as a *pendente lite* purchaser, to enjoin a suit filed by two *Alabama* corporations (never made parties to the foreclosure suit) for *redemption*, sought in *Alabama* as to property lying wholly within the State of *Alabama* and from three *Alabama* corporations,—the question arises, could any *graver* issues be presented for the adjudication of this august tribunal?

The alternative proposition has been well stressed by that recognized expounder and authority on constitutional law, Senator Morgan, leading counsel for these appellants, that when the courts of Alabama proceed with the further adjudication of the suit for redemption and accounting there pending in a court of *proper* jurisdiction (as formally admitted by *all* the defendants having appeared, pleaded, answered and demurred to our bill, and the cause formally submitted and set down for a hearing before Chancellor Kelley); or "when the courts of Alabama proceed, as they will be or have been asked to foreclose this deed of trust in behalf of persons who own bonds that are unpaid and are not parties to this suit, it will appear, not more clearly, but more forcibly, that the decree of the Circuit Court in this cause is a direct and unjustifiable interference with the sovereign rights and the judicial power and

authority of Alabama, and that its decrees, not final in form or effect, which have been affirmed by the Circuit Court of Appeals, are not such final decrees as oust the jurisdiction of the Supreme Court on Appeal.

"And it will then appear that this court, if it shall deny relief to the appellants, will leave open a field of litigated demands, already very wide, to a much greater increase, all of which it is now in the power of this court to settle in its decree in this case. The questions presented are of a character that will outlive the efforts of any other court to settle them."

[See brief, pages 34–5 (green cover), filed by Hon. John T. Morgan, in reply to brief and argument of appellees on motions for *certiorari* and to dismiss the appeal.]

To sum up on this contention:

If the court deems its jurisdiction on appeal doubtful, it now has the record before it. While the *certiorari* may have been based on an appeal, it is at last merely a means of bringing up the record.

Form is immaterial in this regard. The writ of *certiorari* does not give this court jurisdiction; it is only the process to get the record, and the record is now here, perfected by means of the writ of *certiorari*.

In re Chetwood, 165 U. S. 443, 462, *supra*.

II.

Extracts from the record showing that **the question of "jurisdiction," both of "parties" and of "subject-matter," was distinctly raised and passed upon in the very outset of the cause by demurrer in the Circuit Court, and latterly in the opinion and decree of the Circuit Court of Appeals.**

[Refuting loose or general assertion of appellees.]

Appellees have advanced, in a general way, the suggestion that not until the application on part of appellants, through the undersigned, their solicitors, for the previous writ of *certiorari*, was the question of "jurisdiction" ever raised or even suggested in this cause.

This is error and not in accordance with the record, which shows plainly on its face that the question of **"jurisdiction," not only of the subject-matter** *but of* **"parties," has been distinctly raised and formally passed upon by both the Circuit Court and by the Circuit Court of Appeals, in at least two different instances.**

In the very outset or institution of this litigation, and before filing any answer to Robinson, Trustee's, original bill of complaint, the following appears:

"*Demurrer, Bill for Foreclosure, etc.*

"In the Circuit Court of the United States for the Northern District of Georgia.

"J. J. ROBINSON
v.
ALABAMA AND GEORGIA MANUFACTURING COMPANY *et al.*

"The defendant, the Alabama and Georgia Manufacturing Company, by its solicitors, N. J. & T. A. Hammond, and the Huguley Manufacturing Company, by its solicitors, N. J. & T. A. Hammond and John C. Orrick, come and by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true, in manner and form as therein set forth and alleged, do demur and say that said bill is insufficient in law.

"And for causes of demurrer they specially set down the following:

"1. The alleged trust mortgage which is the basis of said complainant's claim of right, gives him no authority to sue *alone* to enforce the same. He has no title in himself alone, but is only *one* of the joint trust mortgagees.

"2. If in any event complainant could so sue alone, his bill does not sufficiently allege any facts which authorize him to sue *without joining W. T. Huguley, his co-trustee, as complainant.*

"3. The surviving joint trustees, W. T. Huguley and J. J. Robinson, for all that appears in said bill, must necessarily join to assert the trust in said mortgage set forth, and because said W. T. Huguley is a citizen of and a resident of said district in which the defendants against whom this bill is filed are citizens and residents, thus said court *has no jurisdiction* to foreclose said mortgage as by said bill prayed for.

"4. Said complainant, if allowed to sue without joining his co-trustee, for the purposes of his said bill, *must necessarily join the bondholders* (or at least *so many of them* as have made the election that the bonds shall be due and then request that *they* proceed) as parties complainants in said bill, and make the *others* parties to his bill, or give a reason why he cannot.

"5. Said complainant does not aver when default in the payment of interest on said bonds or on any of them was made known to the trustees or either of them, nor that *any notice thereof has been served on the president of said Alabama and Georgia Manufacturing Company*, both which are conditions precedent to the exercise of authority and duty by said mortgage conferred on said trustees or a *majority* of them.

"Wherefore these defendants respectfully demand the

judgment of this honorable court whether it or either of them shall be compelled to make any further or other answer to said bill or any of the matters or things therein contained, and pray to be hence dismissed with its reasonable costs in this behalf sustained.

"THE HUGULEY MANUFACTURING CO. and
"THE ALABAMA AND GEORGIA MANUFACTURING CO.

"By JOHN C. ORRICK and
"N. J. & T. A. HAMMOND,
"*Counsel as above stated.*"

"Mr. John C. Orrick and N. J. & T. A. Hammond, solicitors for and counsel of said defendants as above stated, do certify that in our opinions the foregoing demurrer is well founded in point of law.

"JOHN C. ORRICK,
"N. J. & T. A. HAMMOND,
"*Of Counsel for said Defendants.*"

Part I, pp. 11–12.

It is also shown on the face of the last record certified up on this appeal from the Circuit Court of Appeals, that the question of not only jurisdiction of the "*parties*," but jurisdiction of the "*subject-matter*," were both distinctly passed upon by the Circuit Court of Appeals, which, in its opinion (by Shelby, Judge) last rendered in this cause, from which the present appeal was taken and allowed, held as follows:

"1. The possession of the purchasers at the first foreclosure sale was not wrongful in the sense that such possession made them trespassers. **The decree was rendered by a court having jurisdiction of the case.**

The mortgage foreclosed was valid. The decree was binding and not subject to collateral attack. It was valid and effectual to place the purchasers in possession and to protect them in possession till it was reversed.

2 Jones on Mortgages (5th Ed.), Secs. 1587, 1588.

"It was reversed by this court, and the Circuit Court then granted an order of restitution, but upon condition that the Huguley Manufacturing Company would pay into court the sum of $10,000.00 which had been paid by the purchasers at the date of their purchase.

"This court, on appeal, affirmed this condition. The Huguley Manufacturing Company did not pay the $10,000.00 and so were not entitled to the possession by the terms of the order made by the Circuit Court and affirmed by this court. From its inception the possession in question was sanctioned by a decree of the court **having jurisdiction of the parties and the property.**"

Record on Last Appeal, Part III, page 106 (yellow cover.)

Therefore, in view of the question of "jurisdiction" not only of "*subject-matter*," but of "*parties*" having been *twice* raised and *formally* passed upon, first, in the trial Circuit Court, and latterly in the Circuit Court of Appeals, appellants now are clearly entitled in this court to assign as errors, on the face of said record, the respective rulings of the lower courts upon so vital a question.

The consideration of this Honorable Court upon this grave issue is now respectfully and earnestly invoked by these appellants.

III.

Jurisdiction of Parties and Subject-Matter. Burden on Court to Inquire into **ex proprio motu.** *Neither Silence, Consent, or Even Solicitation of Parties Can Convey Juris-*

diction. Advantage May be Taken of Defect at Any Stage of the Proceeding, and even if Point Raised for First Time on Appeal.

The want of jurisdiction of a court of equity to foreclose a mortgage upon lands situated beyond the territorial jurisdiction of the court, and to sell those lands under its decree, is radical and absolute, and may be suggested at any stage of the proceedings by counsel, or may be noticed by the court *ex proprio motu*, Mansfield, etc., Ry. Co. *v.* Swan, 111 U. S., p. 379; Parker *v.* Ormsby, 141 U. S. 81; Grace *v.* Am. Cen. Ins. Co., 109 U. S. 278.

In the case first cited, this court said:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In Morris *v.* Gilmer, 129 U. S., p. 325, this court said:

"But if the record disclose a controversy of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, etc., Ry. Co. *v.* Swan, 111 U. S. 382." And the court goes on and quotes *verbatim* the extract above made from that case.

"If the record on its face shows a want of jurisdiction,

advantage may be taken of the defect, by motion, at any stage of the proceeding."

Coal Co. *v.* Blatchford, 11 Wall. 172.
The Cassius, 2 Dall. 365.
Municipal Inv. Co. *v.* Gardiner, 62 Fed. 954.
Blythe *v.* Hinckley, 84 Fed. 246.
Tug River Coal & Salt Co. *v.* Brigel, 67 Fed. 625; 31 U. S. A. 665.

In Tug River Coal & Salt Co. *v.* Brigel, 67 Fed. 625 (decided May 7, 1895), it was held as follows:

"A judgment was reversed on the sole ground that the Federal courts had no jurisdiction, *which point was raised for the first time on appeal.*"

"Where the court has no lawful power to act, by reason of the fact that such power either is not conferred or is expressly withheld, with regard to the *subject-matter* of the suit, the parties thereto cannot be said to have waived their objection to this want of power because it is not made at the proper time. Such an objection cannot be waived, and is fatal at any stage of the proceeding."

12 Ency. Pl. & Pr. 189. Citing:
Wyatt *v.* Judge, 7 Porter (Ala.), 37.
Merrill *v.* Jones, 8 Porter (Ala.), 554.
Crane *v.* Barry, 47 Ga. 476.

We shall discuss, in their order, the other errors specified in the assignments of errors.

IV.

The Circuit Court of the United States for the Northern District of Georgia was without jurisdiction to entertain so much of the bill filed in this cause as sought to foreclose the mortgage set up against property situated in Chambers county, in the State of Alabama, without jurisdiction to decree the sale thereof to be made by its officers in the State of Georgia, and without jurisdiction to confirm the sale so made.

This want of jurisdiction appears on the face of the proceedings from beginning to end. The mortgage, made an exhibit to and part of the bill of complaint, describes in detail certain islands mortgaged as lying in Harris county, in the State of Georgia, and all the remainder of the property as lying wholly in Chambers county, in the State of *Alabama*. The decree of foreclosure so describes them, and directs the lands situated in Alabama to be sold in Georgia. The deed of the master to the purchasers covers the lands in Alabama. The description is as follows:

"All of a large island in the Chattahoochee river, designated as Island No. 6, containing one hundred and forty-three (143) acres, more or less; also Island No. 9, containing seven (7) acres, more or less; also a small island between No. 6 and No. 9, upon which the east end of the factory building rests, containing four (4) acres, more or less, all of said three above-described islands being in the 20th district of Harris county, Georgia.

"*Also* all that tract or parcel of land lying on the west side of the Chattahoochee river, opposite the above-described islands, bounded on the east by said river, beginning at a point on the west bank of said river, nearly opposite the center of the (7) acre island, at a black gum, at or near a place known as Sell's Corner; thence in a straight line to a point where the land owned in 1868 by Mrs. Freeman, Job Ross, and James Campbell joins, known as the Ross and Freeman Corner, to a pine stake; thence in a line to a branch near said stake, thence in a line down said branch to said river; thence down the western bank of said river to the beginning point, containing sixty-five and 23-100 (65.23) acres, more or less, **lying and being in Chambers county, State of Alabama,** and being part of section twenty-eight and section twenty-nine (28 and 29), Township twenty-one (21), range twenty-nine (29), as well as a forty (40) foot right of way from factory building to the public road, leading from West Point, Georgia, to Berlin, Alabama, at any point where the factory company may

locate it, including *all tenements and improvements, including the cotton mill and all the machinery therein or thereto belonging, and all water privileges and riparian rights now*, or hereafter owned or enjoyed by said Alabama and Georgia Manufacturing Company."

Part I, pp. 6–7.

From the face of this description in the mortgage, therefore, it would seem that, barring the few islands named, this entire cotton-mill plant, lands, factory village, tenements, etc., etc., are situated *wholly* within the State of **Alabama.**

Appellees admit this to be the fact.

It likewise is shown, on the face of the record, that these islands, lying "*opposite*" and on the *other* side of the river, are entirely divorced and separated from *all* the remainder of the said lands and cotton-mill plant in Alabama, and, consequently, that portion of said property *claimed* to be in Georgia, on the one hand, and all the remainder of the property so stated to be in Alabama, are, as matter of fact, plainly "*divisible*" or isolated, the one from the other.

This disposes of the claim of appellees on oral argument that the property is "indivisible."

It is an elementary principle of jurisdiction that a court sitting in one State, whether State or Federal, cannot foreclose a mortgage on and decree a sale of land situated in another State.

Boyce *v.* Grundy, 9 Peters, 275.

Watkins *v.* Holman, 16 Peters, 26.

Northern Ind. R.R. Co. *v.* Michigan Central Railroad, 15 How. 233.

The case of Boyce *v.* Grundy, *supra*, is exactly the case at bar. In deciding that case Mr. Justice Story said:

"Another objection is to that part of the decree which creates a lien upon the land in controversy lying in another State, and decrees a sale for the discharge of the lien. We are of opinion that the decree is erroneous in this respect; * * * the court had no jurisdiction to decree a sale to be made of land lying in another State by a master acting under its own authority."

It would serve no useful purpose to pile up authorities on this question.

When land lies partly in one district of the United States and partly in another district, and both districts are "*within the same State*," then the court of either district may take jurisdiction under the provisions of Sec. 742 of the U. S. Revised Statutes.

But where the land lies in two districts, one in one State and the other in another State, no authority is given to the court of one district to act on the land in the other.

Want of jurisdiction of this kind is absolute, and cannot be cured by waiver or consent of parties.

The Lucy, 8 Wallace, 307.
The Nonesuch, 9 *Id.* 504.
Penn. *v.* Quicksilver Co., 10 *Id.* 553.
Railroad Co. *v.* Ramsay, 22 *Id.* 327.

Necessity of ancillary and auxiliary bills, in order to subject property lying in another State.

In the case at bar, no ancillary or auxiliary bill was ever filed in Alabama to subject the property concededly lying within that State, which was the *whole* cotton mill plant (except, possibly, a few worthless islands).

In Mercantile Trust Co. *v.* Kanawha and Ohio Ry. Co., 39 Fed. 337, Mr. Justice Harlan, after reviewing exhaustively the facts, concluded in the following strong words:

"It might be well if Congress would so enlarge and reg ulate the jurisdiction of the courts of the United States as to enable a Circuit Court, in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad, to take actual possession by its officers of the entire line, and all of the mortgaged property, wherever situated, and administer it for all concerned; preserving in that mode the unity of the road, and the just rights of mortgagor, mortgagees, and creditors, as well as those of the general public interested in commerce among the States. *But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely.*"

The rule recognizing the absolute regularity and necessity for the filings of ancillary and auxiliary bills in order to reach and subject property—especially railroad property—lying in other States, has been carefully laid down, under petition from the Circuit, by Justices Field, Harlan, Brewer and Brown, in the important case of the Farmers' Loan and Trust Co. *v.* Northern Pacific Railroad Co., 69 Fed. 871, and 72 Fed. 26.

To same effect, see:

Dillon *v.* Oregon S. L. and U. N. Ry. Co., 66 Fed. 622, and cases cited.

Central Trust Co. *v.* Wabash, St. Louis and P. Ry. Co., 29 Fed. 620.

Reynolds *v.* Stockton, 140 U. S. 254, 272.

Wilmer *v.* Atlanta and Richmond Air Line Ry. Co., 2 Woods, 447; 30 Fed. Cases, No. 17,776.

A very thorough illustration of the proper course to be pursued, where property is in two States, will be found in the case of Wilmer *v.* Atlanta and Richmond Air Line Railway Company. In that case the existence of the two companies of different States was recognized, and the two

companies appeared and were made parties. Furthermore, in regard to the property outside of the State, the court expressly say :

"We are not asked to foreclose the mortgage. We are not asked to confer on the trustees any power they do not already possess, but simply to tell them what are their powers under their deed."

The court also say : "The complainants may be required to file ancillary bills in other States," and the decree was that the trustees were directed to sell the road at Atlanta, Georgia.

Wilmer *v.* Atlanta and Richmond Air Line Railway Co., 2 Woods 447, 455, 456 and 457.

In all railroad foreclosures recently had in the jurisdiction of the Circuit Court of the United States for the Northern District of Georgia, ancillary bills were filed in every State through which the roads ran ; decrees were taken on each of these ancillary bills, and the mortgagor railroad companies were required to execute deeds, as well as the Master Commissioner, and the purchaser was given the right to demand a deed from the trustee foreclosing the mortgage.

This was true in the Central railroad foreclosure, Richmond and Danville foreclosure, Georgia Pacific foreclosure, Savannah and Western foreclosure, Marietta and North Georgia foreclosure, and Chattanooga, Rome and Columbus foreclosure, and in the case of the Eagle and Phenix Manufacturing Company foreclosure.

In this connection, respecting the jurisdiction of the Circuit Court to convey lands in another State, the Circuit Court of Appeals, Fifth Circuit, in the case of Guarantee

Trust and Safe Deposit Co. *v.* Delta and Pine Land Co., 104 Fed. p. 5 (May 30, 1900), held as follows:

"While a Federal Court of Equity may compel a conveyance of lands in another State by a decree *in personam*, against a party who holds the title, *it has no jurisdiction to itself to transfer the title to such lands by a sale and conveyance made through the master or commissioner.*"

* * * * * * *

In the opinion, it is said:

"A writ of assistance, issued by the court in Tennessee to put the purchaser, at the sale made by the master, in possession of the property, *would be wholly inoperative, because such process could have no extra-territorial effect.*"

Toland *v.* Sprague, 12 Pet. 300; 9 L. W. 1093.
Picquit *v.* Swan, 5 Mason, 40; Fed. Cases, No. 11, 134.
Ex parte Graham, 3 Wash. C. C. 456; Fed. Cases, No. 688.
Walker v. Lea, C. C. 47; Fed. Cases, No. 645.

See also Pennoyer *v.* Neff, 95 U. S. 714; L. W. 565.

See brief of John T. Morgan filed on *certiorari*, pp. 78–89.

See brief of John T. Morgan, Welles, Bennett & Welles, and John M. Chilton, filed under application for writ of prohibition, mandamus, etc., pp. 6 to 14.

In view of these settled adjudications on part of both the Circuit Court and Circuit Court of Appeals, appellants submit and insist that, if uniformity and consistency of decision and practice are to be observed, these courts ought not be permitted to make an exception of *this* case and

thus ignore its own invariable rule which each court has applied in all other cases of foreclosure.

V.

Jurisdiction as to Parties— When a want of indispensable parties cannot be supplied without ousting jurisdiction, the bill should be dismissed.

See :

Northern Indiana R.R. Co. *v.* Mich. Cent. R.R. Co., 15 How. 233.

4th Na[illegible] Bank New York *v.* N. O. and C. R. Co., 11 Wall. 624, 20 : 82.

Shields *v.* Barrow, 17 How. 130, 15 : 158.

Barney *v.* Baltimore, 6 Wall. 280, 18 : 825.

California *v.* Southern Pac. Company, 157 U. S. 229.

Louisville, N. A. and C. R.R. Co. *v.* Louisville Trust Co., 174 U. S. 552.

Balto. and Ohio R.R. Co. *v.* Wheeler, 1 Black, 286, 17 : 130.

Also reported as Ohio and Miss. V. R.R. Co. *v.* Wheeler, 1 Black, 286, 17 : 130.

St. Louis and San F. R.R. Co. *v.* James, 161 U. S. 54, 40 : 80.

It is the duty of the Circuit Court to dismiss the suit if parties are improperly or collusively joined or made for purpose of creating a case of which that court would have cognizance, and an injunction will lie to prevent an execution of the decree.

18 Stat., p. 3, p. 470 (Act of March 3, 1875, c. 137, Sec. 5).

Hawes *v.* Contra Costa Water Co., or

Hawes *v.* Oakland, 104 U. S. 450.
Hayden *v.* Manning, 106 U. S. 586.
Broadus *v.* Broadus, 86 Fed. 951.
Works on Courts and their Jurisdiction, p. 104, citing:
Shryer *v.* Miner, 20 Ind. 175.
See also specially: Williams *v.* Nottawa, 104 U. S. 209.

This subject has been so thoroughly covered in the briefs of associate counsel, that we will only remind the court of the following statement in the original decree of the Circuit Court, viz: "And the case has really more the appearance of the holders of these obligations proceeding through the trustee, as a *mere nominal party*, than the act of a trustee in discharge of the duty incumbent upon him by virtue of a trust which he had assumed and agreed to carry out."

The record undoubtedly discloses that the framers of this bill, by failing to join these bondholders, both majority and minority, as parties in their individual capacity, as suitors, and by omitting to name the holders and state their citizenship (which *was* stated in part in the answer), and by failing to join the two *Alabama* corporations *first* chartered before the Georgia, and by misjoining William T. Huguley, co-trustee, as party *defendant*, whereas there can be no question that he properly should have been aligned as an indispensable party *complainant* with Robinson, perpetrated a patent fraud upon the jurisdiction of the Circuit Court. After the reversal of the first sale, when it subsequently developed that not only the holders of the minority ($22,000.00) bonds had repudiated the action of Robinson and Lanier in bringing the bill for foreclosure, but that even the majority bondholders ($43,000.00) then refused to follow further the leadership of Lanier, and actually rebelled and refused to permit their bonds used in his second bid of May 6, 1896—it became then absolutely indispensable that

both wings of these bondholders should have been joined as parties for the common protection of their rights against the usurpation of the West Point Manufacturing Company, which, under its "*aliases*," and "dummies," the "Galeton Cotton Mills" and "Riverdale Cotton Mills," has clung tenaciously to the possession of this property for now ten years, pocketing several hundred thousands of dollars of rents and profits due the Huguley Manufacturing Company, though ordered by the Circuit Court paid over to the *bondholders, which was never obeyed.*

Despite all these conflicting equities—representing at least *four* distinct antagonistic interests, viz: (*a*) Huguley Manufacturing Company, (*b*) Bondholders (minority), (*c*) Bondholders (majority), and (*d*) West Point Manufacturing Company or "Galeton Cotton Mills,"—we find the solicitors for the West Point Manufacturing Company, who had originally set out to represent the bondholders,—a directly opposite and hostile interest to the West Point Manufacturing Company, latterly drafting the final decrees of June 4, 1898, and October 15, 1898, which were approved by said Circuit Court, whereby it was sought to adjust and reconcile the divers conflicting interests and equities of all four of the named indispensable parties under *one* general decree—a sheer impossibility, and an effort which, while taking every care of the favored suitor, L. Lanier and his West Point Manufacturing Company, slaughtered the *cestui que trust* which the court was supposed to be [illegible]lously safe-guarding, while the interests of the Huguley Manufacturing Company were utterly lost sight of in this final decree.

In this connection, and especially mindful of questions propounded at the hearing inquiring concerning the character of our other suit still pending and undetermined before your honors, we deem it in order to invite your attention to the following:

The record discloses that neither the Alabama and Georgia Manufacturing Company, of Alabama, the mortgagor corporation, nor the Huguley Manufacturing Company, of Alabama, the owner of the equity of redemption to the entire cotton mill plant and village and all tenements, appurtenances, etc., through a quit-claim deed from W. H. Huguley & Company in payment of its capital stock, were ever made or served as parties to the said original bill of foreclosure, and never appeared in said suit. Indeed, it appears on the face of the record that, barring a service upon N. J. & T. A. Hammond, in their capacity of solicitors solely, there was in fact no legal service ever made or any appearance entered in so far as the Alabama and Georgia Manufacturing Company, of Georgia, or of the Huguley Manufacturing Company, of Georgia, were concerned, not one of the regular officers or agents of either of said corporations even of Georgia having ever been duly and properly served, as required by law. (Part I, p. 10, and Condensed Printed Record, or Extracts, pp. 10–11, used on application for *certiorari*.) On its face, also, it is made manifest that the president of the Alabama and Georgia Manufacturing Company, W. H. Huguley, himself then a resident and citizen of Chambers county, Alabama, was never notified or served in any capacity, whether by bondholder or trustee, as required by the express terms of the trust deed, or by any officer appointed by the court, as expressly required by law.

Code of Alabama, Sections 1234 and 3274.
Code of Georgia, Section 1899 (3369).
See also Swan Land and Cattle Co. *v.* Frank, 148 U. S. 604.

"The question whether or not jurisdiction has been acquired by a proper service of process is one which involves the jurisdiction of the court, within the meaning of the Act

of Congress of March 3, 1891, Sec. 5, providing for an appeal from the District Court directly to the Supreme Court of the United States when the jurisdiction of the former court is involved."

Shepard *v.* Adams, 168 U. S. 608, 602.

"A corporation is, and while its corporate existence lasts, must remain, a citizen only of that State which gave it life."

United States *v.* Southern Pacific R.R. Co., 49 Fed. 303.
St. Louis *v.* Wiggens Ferry Co., 11 Wall. 423, 192.
St. Joseph and Grand Island R. Co. *v.* Steele, 167 U. S. 659, 663.
Ohio, etc., R.R. Co. *v.* Wheeler, 1 Black, 286.

"The defendant being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State; and, although incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue *or be sued by another citizen of Alabama in the courts of the United States.*"

Memphis and Charleston R.R. Co. *v.* Alabama, 107 U. S. 581, citing:
Ohio and Miss. Railroad Co. *v.* Wheeler, 1 Black, 286.
Railway Co. *v.* Whitton, 13 Wall. 270, 283.

"For the purpose of determining the jurisdiction of the Circuit Court of the United States, a corporation chartered by several States must, when sued in either State, be treated as a citizen of that State alone, without regard to where it has its principal place of business."

Shaw *v.* Mining Co., 145 U. S. 449.
Morawitz on Corporations, Secs. 996, 999.
Railway Co. *v.* Whitton, 13 Wall. 283.
Nashua and Lowell R.R. Corp. *v.* Boston and Lowell R.R. Corp., 136 U. S. 356.
Graham *v.* Boston, H. and E. R. Co., 118 U. S. 161.

Referring to the case of Ohio, etc., R.R. Co. *v.* Wheeler,

1 Black, 286, Mr. Carter, in his "Jurisdiction of Federal Courts," p. 79, says:

"However misleading the fact of the single name in both States, the single objective purpose, or the community of interest may be, the fact must remain that in legal effect there is a distinct corporate entity in each State, owing its paternity to that State alone. To adopt the language of the court in Ohio, etc., R.R. Co. 'The president and board of directors of the Ohio & Miss. R. Co., is, therefore, a distinct and separate corporate body, in Indiana, from the corporate body of the same name in Ohio.'"

VI.

No effective sale, conveyance or confirmation under any view against the Alabama and Georgia Manufacturing Company. It had expired before the same occurred.

Charter expired March 21, 1896.

West End & Atlanta Street Ry. Co. *v.* Atlanta Street R. Co., 49 Ga. 151, 153.

Suit against *it* fell on such death. Subsequent action a nullity.

Pendleton *v.* Russell, 144 U. S. 640, 644.

Logan *v.* Western & Atlantic Ry. Co., 87 Ga. 534.

In this case the decree is wholly against Alabama and Georgia Manufacturing Company of *Georgia*. Therefore it was an essential party, and as to it the sale and all proceedings are void.

Huguley Manufacturing Company not decreed against.

No *res adjudicata*, even where jurisdiction of case pending, as to those not parties.

VII.

No valid decree or order against William T. Huguley, as trustee, ever rendered or even considered or mentioned by the court on the issues of fact presented in the pleadings, the only decree entered being a so-called decree pro confesso on the order book by counsel for complainants being merely interlocutory, and the original decree having been reversed, could not become final until "opened and explained to the court" when foreclosure was applied for. Hence, Huguley still free to challenge in the Supreme Court the want of equity in the bill and the jurisdiction of the Circuit and Appellate Courts over the subject-matter or parties, and the jurisdiction of the court to grant the prayer in the bill.

It is shown on the face of the record that there was never entered or even considered or asked for against William T. Huguley, as trustee, any valid decree in this case; that the only decree taken was merely a so-called decree *pro confesso*, which was signed *only* by the counsel for the complainant in the equity suit, but was never mentioned by the court in any decree or order in the cause on the issues of fact presented in the pleadings until March 30, 1895.

The decree prior to that date foreclosing the mortgage having been reversed on the appeal, and the decree of March 30, 1895, making no reference to a decree *pro confesso* against W. T. Huguley, defendant, the decree entered on the order book by complainants' counsel was merely interlocutory, and, therefore, any after proceedings could only be *ex parte*, and it could not become a final decree against Huguley until it had been "opened and explained to the court" when the decree of foreclosure was applied for.

Such being the case, appellants contend some court must

ascertain and decree that the decree *pro confesso* so ente
on the order book by counsel "was proper to be mad
and accordingly Huguley can now raise any questions ch
lenging the want of equity in the bill or of the jurisdict
of the court over the subject-matter or parties to the s
or its jurisdiction to grant the prayer in the bill.

Thompson *v.* Wooster, 114 U. S. Repts. 104, 113.

As to decree *pro confesso* against William T. Hugul

See full discussion in the brief filed by Hon. John
Morgan, leading counsel for appellants, "in reply
brief and argument of appellees on the motions for *certio*
and to dismiss the appeal" (deep green cover), pp. 19 a
39–41, and also in his "argument and brief on the merits
the case" (light green cover), pp. 3–6; and also his
"supplementary brief" thereto (crimson red cover),
1–4).

See also brief of Morgan, Welles, Bennett & Wel
and Chilton, on "petition for prohibition, mandam
etc." (light buff cover), pp. 19, 23.

VIII.

*The property of the Alabama and Georgia Manufactur
Company, consisting of the factory plant and some* $40,000
of cash, and other "quick assets," having been placed,
1888, *under the control and protectorate of the Chanc
Court of Troup county, Georgia, through its receiver, H.
Fisher, who was continued in office under heavy bond for
administration of the trust estate, and particularly for
purpose of carrying out an express mandate of said S
court charging him with the duty to "promptly pay the p
due interest and the interest to accrue, when due, on the
mortgage bonds of said corporation, out of any funds he

have while he remains in office," and said receiver having in hand at least $20,000.00 *of cash and other "quick assets" available to meet the* $1,720.00 *of coupon interest on the* $43,000.00 *of complaining bonds, on the* 1*st day of July,* 1890, *and the* 1*st day of January,* 1891, *and on the* 21*st day of January,* 1891 *(the date when the original bill was filed), and the jurisdiction of the State Court having thus first attached, the Circuit Court of the United States for the Northern District of Georgia, was without jurisdiction to entertain the bill for foreclosure, without jurisdiction to decree any sale of said property, and the sales made pursuant to its decrees were absolutely null and void; and Robinson and Lanier, who were stockholders and directors in the Alabama and Georgia Manufacturing Company (Lanier having instigated the suit and secured the appointment of said receiver by the State court) were guilty of contempt of the State court for interfering and bringing this bill in the Federal court.*

It is shown on the face of the record in this cause that under the decree of the State Chancery Court of Troup county, Georgia, the following express stipulations, among others, appear:

"Further, in said subdivision, it was decreed to be paid as follows:

"F. Whatever part of the interest on the coupons of the first mortgage bonds of the Alabama and Georgia Manufacturing Company paid or to be paid by said Fisher under the order of this court for the disposing of the assets in his hands, as shall appear by the orders of the chancellor in this regard.

"G. These last-mentioned items to be taxed by the clerk upon such orders of the chancellor, and the clerk shall tax all other costs not herein specially provided for.

"Said decree further provides as follows:

"10. The dignity of the respective liens herein set forth are as follows:"

First. (Here the decree goes on to give precedence and priority to the "*interest on the mortgage bonds of the Alabama and Georgia Manufacturing Company over all other liens.*")

Part I, pp. 19–20.

Referring to the subsequent sale by the said receiver under the decree of the State court, the answer recites as follows:

"The bidders at said sale (W. H. Huguley & Co.) bid for said property the sum of $69,000.00. The next highest bid to their own was $68,500.00, which was by persons (Lanier and associates) in no way connected with those who did purchase, and who had none of the claims which were to be treated as cash at said sale. That shows the value of said property at that time. *All said bidding was for the property, subject to said first mortgage.*" (Ans. of defts.)

Part I, p. 21, and Part II, p. 145.

This answer of the Huguley Manufacturing Company and other like evidence in the record demonstrate the indisputable fact that this property was being zealously guarded by the State court, and with an eye singly to averting any default or foreclosure so long as its receiver "remained in office," and that its jurisdiction and custody continued for that purpose.

That this is clear is shown by the following evidence of William T. Huguley, which we here reproduce as pertinent to this material point:

Answer to Interrogatory 8. "I never, at any time, voluntarily abandoned the first appeal. Our failure to prosecute it was from sheer inability to make other than the supersedeas bond, as explained (*i. e.* by the American Surety Company.) Our inability grew out of the following facts:

"1. Because we had turned over in 1888 to Fisher, the receiver of the Alabama and Georgia Manufacturing Com-

pany, a large amount of 'quick assets,' (about $40,000), in self defense having the following order of court (May 22d '89) passed:—'*Said Fisher, receiver, shall promptly pay the past due interest, and the interest to accrue, when due, on the first mortgage bonds of said corporation out of any funds he may have while he remains in office.*'

"The receiver thus charged with this particular duty, did pay said interest and continued to act under said order up to the date of said alleged default, and it is now insisted that said receiver *had in hand on the date of said alleged default ample cash funds with which to pay said interest*, and he undoubtedly would have paid said interest *had proper demand been made on him.* It was his duty as the only legal representative (except the president) of the Alabama and Georgia Manufacturing Company to pay said interest, etc."

"2. So, also, my hands were tied in another direction. Under a certain lease contract, I had resigned the presidency of the Huguley Manufacturing Company, and transferred to D. Jannopoulo, St. Louis, all the 'quick assets' of the company, it becoming incumbent upon him in turn to *keep the mill a 'going concern' to meet all its current expenses, and especially take care of the interest on the bonds.* This contract was made in 1890 and expired by limitation in 1893. Said Jannopoulo is a foreigner, and little versed in matters of law—besides owning but a few shares of stock in the Company. (40)."

Part II, p. 142.

"In conclusion it is proper for me to explain that *because of the order of the State court, I had to transfer to the receiver about $40,000 of 'Quick Assets,' and in view of the special order of court charging him with the particular duty to pay said interest, and knowing he had ample cash in hand, I specially relied on him to meet the interest and otherwise take such steps as would protect his said trust under the circumstances.*"

Part II, pp. 144–5.

Answer to Cross-Interrogatory 9. "The Alabama and Georgia Manufacturing Company did have interest in said

litigation as principal defendant. All its interest in *th plant only*, was sold at the receiver's sale at Hamilton, bu this by no means exhausted all the assets of the company At the time of the sale of this realty, the receiver of th State court still held in his possession a large amount supplies and findings, and also cash and other 'Quick A sets,' valued at about $20,000, all of which were availabl to meet the interest on the first mortgage bonds in conform ity with the express order of the State court of May 2 1889, wherein it was specially enjoined on said receiver pay promptly 'out of any funds of the corporation he ma have so long as he remains in office' the interest on sai bonds. Suffice it, the receiver is still 'in office' and wa 'in office' on January 1, 1891, and on that date *had amp cash funds with which to have promptly paid the interest ha due demand been made upon him.*

"*Until he shall have been discharged he is still the leg representative of the State court and charged with certa duties thereunder, and the corporation not defunct.*'

Part II, p. 153.

The record (answer of defendants) also shows on its fac the following facts:

That said Robinson and L. Lanier were stockholders an directors of the Alabama and Georgia Manufacturing Com pany, mortgagor.

Part I, p. 18.

That said "L. Lanier was not a party on the record i said litigation (in the State court) with the old compan but was a *witness for complainants therein and a most acti worker for them.* Before said decree was taken complai ants' counsel had to and did consult said L. Lanier to s if he would consent thereto, and he did so consent. * * Said Laniers are interested in a rival cotton mill on th same river, about 2½ miles above this mill, and these d fendants think said Laniers are much more interested

crippling the Huguley Manufacturing Company than in collecting said coupons or bonds."

Part I, pp. 22–3 and 27. (Ans. of Defts.)

And the evidence of John C. Orrick, St. Louis, recites:

"I know that Mr. Lanier was the chief instigator among the bondholders of the foreclosure proceedings. That the Huguley Manufacturing Company had deposited the interest money at the bank at Atlanta, Ga., and that he, with others, wrongfully refused to accept the money in payment of their coupons due at that time. That Lanier was interested in breaking down the Huguley Manufacturing Company, as it was a competitor of a mill which he managed a few miles off."

Part II, p. 55.

In the case of Tyler, petitioner, it was held that property of the South Carolina Railway Company, which was in the possession of a receiver duly appointed by the Circuit Court of the United States for the District of South Carolina, was not subject to seizure and levy under a process issuing from a court of the State to enforce the collection of a tax assessed upon the property of the railroad company under the laws of the State. The court there said:

"The property in question was in the custody of the Circuit Court, in a cause within its jurisdiction, and protected by injunction. The power exercised was the power to protect the property in the custody of the court from invasion, and in order to sustain the receiver's application the ordinary grounds of equity interposition were not required to be set forth."

* * * * * * *

"No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court; and that if any person, without leave, inten-

tionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor."

Citing—

Wiswall *v.* Sampson, 14 How. 52, and a number of other cases.

* * * * * * *

"The general doctrine that property in the possession of a receiver appointed by a court is *in custodia legis*, and that unauthorized interference with such possession is punishable as a contempt, is conceded. The maintenance of the system of checks and balances characteristic of republican institutions requires the co-ordinate departments of government, whether *Federal* or *State*, *to refrain from any infringement of the independence of each other, and the possession of property by the judicial department cannot be arbitrarily encroached u on, save in violation of this fundamental principle.*

"The levy of a tax warrant, like the levy of an ordinary *fieri facias*, sequestrates the property to answer the exigency of the writ; but property in the possession of a receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."

In the recent case of Pittsburg, etc., Railway Co. *v.* Loan and Trust Co., *supra*, this court was called upon to consider what constituted an invasion of the possession of a receiver, and while holding that the facts in that case did not show that the possession of the receiver had been interfered with, it adhered to the doctrine in Wiswall *v.* Sampson, and said that if the facts of the case had disclosed an actual sale of the property while it was in the possession of

receivers pending the proceedings in the foreclosure suits, the doctrine laid down in that case would apply and *such sale would have been ineffectual to pass title to the purchaser.*

"The principal authority cited in support of this contention is Wiswall *v.* Sampson, 14 Howard, 52–68, in which it was held that while real estate is, 'in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose.'"

"If the rule were otherwise," the court said, "the whole fund might pass from its hands before final decree and the litigation become fruitless. We do not perceive that the principle announced in Wiswall *v.* Sampson controls the determination of the present case. *If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser.*

The Federal courts of the United States, as well as the State courts, have regarded as settled law and unquestioned authority the doctrine laid down in Wiswall *v.* Sampson.

In Virginia, etc., Iron Co. *v.* Bristol Land Co., 88 Federal Reporter, 134, the Circuit Court for the Western District of Virginia reviewed the decisions of this court, and held that where land of the defendant company was in the custody of a receiver duly appointed to wind up its affairs, a sale of such lands for taxes is *void and the purchaser at such sale acquires no title thereunder.* The court in its opinion said:

"The chief defense relied on by the defendants in their answers is that Smith, the treasurer of the city of Bristol, having, under the provisions of the Virginia tax law, sold the lots in question to the auditor of public accounts of the

State of Virginia for the benefit of the Commonwealth and the city of Bristol, that that was a valid sale, and that the other defendants, in pursuance of the provisions of another section of the tax law touching delinquent lands, are simply endeavoring to acquire the title which vested in the auditor for the benefit of the Commonwealth and city of Bristol. If the treasurer, Smith, had no right to invade the jurisdiction of this court, and take control of and dispose of property in the hands of its receiver; if in doing this he was in contempt of this court, then the court is at a loss to see on what principle he could make a valid sale of this property to the auditor for the benefit of the Commonwealth and the city of Bristol, any more than he could make a valid sale to a private person.

"His authority as a tax collector to dispose of these lands as delinquent for the non-payment of taxes ceased when the proceedings were instituted for the sequestration of all the property of the Bristol Land Company. *After that no person or officer, whether State or Federal, not even the receiver himself, could sell any of the property except by an order of the court. A sale made in any other way or by any other person is null and void.*"

In the case of Scott *v.* Crawford, 41 S. W. 699 (Tex. Civ. App.), (decided in June, 1891), which was an action by Crawford and others against the Clark-Plumb Company, a Texas corporation, in which Scott had intervened and asked the court to deliver to him certain lands which he had purchased at a sale by the trustee under a power given in a deed of trust made to secure the payment of certain promissory notes, the Court of Civil Appeals, of Texas, held that the sale made by such trustee while the property was in the possession of a receiver regularly appointed by the district court of the United States was *absolutely void*. The court in its opinion follows the decision of this court in Wiswall *v.* Sampson, and says:

"We are inclined to think that the sale made by the

trustee while the lands were in the possession of a receiver *is void and cannot be sustained* (Ellis *v.* Water Co., 86 Tex. 109; 23 S. W. 862; Wiswall *v.* Sampson, 14 How. 52.) It is true that in this case the sale had been made *under an execution issued by another court than the one in which the receivership was pending and not under and by virtue of a deed of trust and power of sale* as in this instance; but the writer at least can see no good reason why the rule should not apply with equal if not greater force, in the latter case. In Wiswall *v.* Sampson, *supra*, the Supreme Court of the United States say: 'The settled rule also appears to be that where the subject-matter of the suit in equity is real estate which is taken into the possession of the court pending the litigation by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril.' Again the court says: 'As we have already said, it is safe for the disposition of this case to hold that *while the estate is in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place either on execution or otherwise without leave of the court for that purpose*, and upon this ground we hold that the sale by the marshal on the two judgments was *illegal and void and passed no title to the purchaser.*' If this invalidity results from the 'title being bound' when the land is placed in the possession of a receiver, as is declared by this decision, *then no sale of any character, whether under deed of trust, power of attorney, process of court or otherwise, can affect the title in the hands of the receiver if made without consent of the court having custody thereof.*"

"The principle applied in Wiswall *v.* Sampson, *ubi supra*, must be regarded as firmly established in the decisions of this court. It has been often approved and confirmed. Peale *v.* Phipps, 14 How. 367; Hagan *v.* Lucas, 10 Pet. 400; Williams *v.* Benedict, 8 How. 107; Pulliam *v.* Osborne, 17 How. 471; Taylor *v.* Carryl, 20 How. 583; Yonley *v.* Lavender, 21 Wall. 276; People's Bank *v.* Calhoun, 102 U. S. 256; Barton *v.* Barbour, 104 U. S. 126; Covell *v.* Heyman, 111 U. S. 176."

Other cases affirming the doctrine of Wiswall *v.* Sampson are:

Walling *v.* Miller, 108 N. Y. 172, 177.
Russell *v.* Railway Co., 68 Tex. 652.
Gay *v.* Brierfield, 94 Ala. 310.
Dugger *v.* Collins, 69 Ala. 330.
See also Heidritter *v.* Elizabeth Oil-cloth Company, 112 U. S. 294.

The Court of Appeals of Virginia, in a suit which went to that court from the Circuit Court of the United States for the county of Alexandria, in the District of Columbia, after that county was retroceded to Virginia, held that commissioners to sell (trustees), appointed to execute a decree of the lower court, proceeding to sell under such decree, after an appeal taken and supersedeas bond given, were guilty of a contempt of the appellate court, and their acts were *null* and *void as to the rights of the parties to the appeal.*

McLaughlin *v.* Janney, 6 Grattan (Va.), 609.

No stronger statement of the doctrine here relied upon is to be found anywhere than in the case of Day *v.* Postal Telegraph Company, 66 Md. 354, 367, 368, in which case Mr. Chief Justice Alvey, delivering the opinion of the court, said:

"But whatever may have been the purposes and designs of the parties professing to represent these companies in the transactions between them, it is very clear, upon most unquestionable authority, that after the affairs of the New York company had been placed in the hands of receivers by the Supreme Court of New York, which was on the 3d of May, 1885, and so likewise after receivers had been appointed by the court in this State, *nothing could be done whereby the status of the affairs of that company could be*

effectually changed, or its rights in any way lessened or prejudiced, without the sanction of the court having jurisdiction of the subject-matter. Any person relying upon such transaction for his protection, must show that what was done was done with the sanction of the court. The receiver is but the officer or agent of the court from which he derives his appointment, and his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, *in gremio legis*, for the benefit of whoever may be ultimately determined to be entitled to its possession (High on Rec., Secs. 134, 139). And this strict rule forbidding the interference of a third party with the possession of the receiver, without leave of the court, applies without regard to the fact, whether such party claims paramount to or under the right which the receiver was appointed to protect (High on Rec., Sec. 139; Evelyn *v.* Lewis, 3 Hare, 472)."

The doctrine here laid down is simply an amplification of what is said in 2d Daniel's Chan. Pl. and Pr., 1431, 1433 (3d Amer. from 3d Eng. ed.):

"A receiver appointed by this court is appointed on behalf of *all* parties, not of the plaintiff or of the defendant only; therefore if any loss arises from deficiency in his accounts, the estate must bear it. The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it, and when the party entitled to the estate has been ascertained, the receiver will be considered as *his* receiver.

"The rule that the possession of a receiver is not to be disturbed extends even to cases in which he has been appointed expressly *without prejudice* to the rights of persons having *prior* estates, and the individuals having *prior* estates must, if they wish to avail themselves of them, apply to the court to bring an ejectment or to be examined *pro inter esse suo*, and this although their right to take possession is clear. In this respect there is no distinction

between possession by a receiver and that by sequestrators under a commission of sequestration."

"A judgment entered by a court without jurisdiction is *void* and will be held such—on appeal in the same proceeding."

Am. and Eng. Ency. of Law, Vol. 12, p. 311, Note 1.

IX.

*The trust deed having expressly stipulated and provided that, as condition precedent to foreclosure, due presentment and demand must be made "at the office of the Company in West Point, Georgia," and should "default be made in the payment of said bonds * * * or in the payment of interest," * * * and that the interest or bond "shall remain unpaid for six months"* **after notice is served on the president of said company**, *and the record showing on its face that there was such office and president, and that no presentment, demand or notice, or any pretence of such made at any place or of any official or person competent to answer for said company—except by the holders of the* $22,000.00 *of minority bonds, who were promptly paid—the Circuit Court of the United States for the Northern District of Georgia was without jurisdiction to ignore the express terms of a contract and arbitrarily decree a default in the interest and authorize foreclosure as to any of the bonds, said condition precedent having been utterly disregarded.*

This proposition has been so ably pressed upon the attention of this court in the initial contention of Hon. John T. Morgan, on the "argument and brief on the merits of the case" (green cover, pp. 6–12), wherein he has adopted and incorporated, as part of his own, the former forcible presentation of the same question in the Court of Appeals,

by Hon. Robert C. Brickell, ex-Chief Justice of Alabama (pp. 13–22), that only because of its important bearing upon the case in its very first stage do we deem it necessary to do more now *en passant*, then to beg this court's attention to all said in these convincing arguments from such recognized authorities.

X.

When the mandate of the Circuit Court of Appeals reversing the decree of foreclosure, and remanding the case to be proceeded with according to the views expressed in its opinion, one of those views being that the error in the reversed decree was such as to vitiate all subsequent proceedings, was filed in the lower court, and it appeared on the face of the record that the complainants themselves, the bondholders, had purchased the mortaged property at the sale made under the reversed decree, it was the duty of the lower court to order restitution of said property to the defendant, the Huguley Manufacturing Company, without imposing upon it the condition of first paying into the registry of the court the sum of ten thousand dollars, all of which had been expended by the court and complainants in the payment of claims and demands for which neither the property nor the defendants were liable at law or in equity. The Court of Appeals erred in approving this conditional restitution.

It is too well settled for controversy that a reversal of a decree under which a party to a suit has acquired title or possession annuls the title and right of possession, and entitles the party who has been dispossessed *to prompt* restitution.

Herman on Execution, Ch. 608.

Freeman on Judgments, Secs. 481, 482.

Walker's Am. Law, p. 496.
Beach on Modern Equity Practice, Sec. 993.
Ex parte Walter Bros., 89 Ala. 239.
Galpin *v.* Page, 18 Wall., p. 373.
Northwestern Fuel Co. *v.* Brock, 139 U. S., p. 216.

In Foster's Fed. Prac., 2d ed., Sec. 495, the rule is thu stated:

"Where a judgment or decree which is reversed ha been executed pending the writ of error or appeal, th mandate should include a direction to the court below t compel restitution."

The rule as stated by Mr. Freeman (*supra*, Sec. 481), i as follows:

"The reversal of a judgment by any competent authorit restores the parties litigant to the same condition in whic they were prior to its rendition. The judgment reverse becomes mere waste paper, and the parties to it are allowe to proceed in the court below to obtain a 'final determina tion of their rights' in the same manner and to the sam extent as if their cause had never been heard or decide by any court. Neither, in the subsequent prosecution o the cause, can suffer detriment nor receive assistance fro the former adjudication."

That this is law of Georgia is shown by Ragan *v.* Cuyle 24 Ga., p. 400.

The same author says again (Sec. 482):

"Upon the reversal of its judgment against him, the a pellant is entitled to the restitution from the responde of all the advantages acquired by the latter by virtue of th erroneous judgment. The successful appellant is entitle to a restitution of everything still in possession of his a

versary *in specie;* not the *value* but the *thing.* * * * If the plaintiff purchase the property of the defendant at a sale under a judgment or decree, his title will be defeated by a subsequent reversal. * * * The right to restitution cannot in any case be resisted on the ground that on final hearing of the cause it will appear that the party of whom restitution is sought is entitled to the property of which he got possession, or of the money which he received under the reversed judgment."

The following clear statement of the principle and its *rationale* is found in *ex parte* Walter Bros., 89 Ala. 239:

"We can conceive of no case in which a party, who pays money on a decree which is subsequently reversed, is not entitled to have restitution of what he has paid, and to be reinstated in the position, and to all the rights he had prior to the rendition of the erroneous decree. It is not material what those rights were, or would probably, or even certainly and necessarily be determined to be, in the further progress of the litigation. He is entitled to have his final equities adjudicated while he yet occupies whatever vantage ground was his in the inception of the contest, and from that standpoint to invoke the judgment of the law on the issues he presents. When he asks, after the reversal of a decree which has erroneously adjudged his rights and disturbed his relations in the case, to have his original status restored, it is no answer to his petition to say that, on a final hearing of the cause, it will again be decreed that he pay that of which he now seeks restitution. To so hold would be to prejudge the case, to decide in advance of the submission of the issues on pleading and proof that the party, who has been put at a disadvantage by the execution of a wrongful decree, though properly before the court, is not entitled to any relief in the cause. On the other hand, we are unable to see any predicate for the claim of the other party to retain what, confessedly, he has wrongfully received. He had no right to the money involved in the litigation, in contemplation of law, until there should be a correct determination of the matters in

dispute, however clear his rights may have been, in point of fact. He, therefore, proceeds with the cause, having an undue advantage of his adversary, and is in fact in the attitude of having gained what he claimed before his right to it had or could have been determined. We entertain no doubt, therefore, of the absolute right to have restitution made on the one hand, and the absolute correlative duty to make restitution on the other, wholly regardless of considerations looking to the final equities of the parties."

To same effect, see—

U. S. *v.* Bank of Washington, 6 Pet. 19.
Morris Cotton, 3 Wall. 507.
Ex parte Morris, 9 Wall. 65.
The Rachel *v.* U. S., 6 Cranch, 329.
Perrin *v.* Lepper, 56 Mich. 361 (Judge Cooley).

In the case at bar the court ordered restitution, but under an illegal, inequitable, and improper condition precedent, *i. e.*, that the Huguley Manufacturing Company, the owner of the property, who was not personally bound for the complainants' debts, and against whom there was no existing decree, should first pay into court the ten thousand dollars claimed to have been paid in by the purchasing complainants as part of the price of their bid.

We know of no case in the books except this case where any such condition to restitution was imposed. In every judicial sale, where the plaintiff in execution buys, the price of the sale is paid in by him and the amount, less costs, is applied to the payment of his debt. In no instance, barring this case, has any court ever held that where the decree under which the sale is made is reversed and it is called upon to do "prompt justice," the defendant against whom there is no judgment, or order, or decree to pay money cannot recover his property from the plaintiff until he pay back in whole or in part the money paid in by plaintiff,

which has gone back to plaintiff, or has been disbursed in paying the costs of the void sale?

If the part of the fund so paid in on the void sale had been applied to the payment of past due prior liens bearing on the property sold, and the remedy by subrogation of the purchaser thereto had been lost or made ineffectual, then it would be proper and right for a court of equity to impose the prepayment of such debts of the owner as a condition to restitution.

But in this case no such equity presented itself.

The defendants were in no manner bound to pay a single dollar of the debts for which the ten thousand dollars were disbursed.

This fund was disbursed, as appears by the report of the commissioner (Part II, p. 221), as follows:

Fees of trustee's solicitors,	$2,600 00
To Robinson, trustee,	500 00
To court costs,	230 50
To special commissioner fee,	400 00
To advertising, etc.,	370 00
	$4,100 50

The balance was paid in cash as a dividend on bonds Nos. 67, 68, 70, 71, 72, 73, 74, 115, 116, 117, and 118, belonging to Mrs. S. H. Huguley.

As shown by the final decree (Part II, pp. 280–1), these identical bonds were excluded from the benefits of foreclosure and the principal thereof was declared not in default.

Before this petition of restitution had ever been filed the very court who refused it had, in this very case, decided that defendants were not liable for solicitors' fees. See opinion in Robinson *v.* Alabama and Georgia Manufacturing Co., 51 Fed. Rep., p. 268.

In the final decree in this case (Part III, p. 65) the s
court adjudged that identically the above costs, fees,
plus $2.00 additional, "*paid out under the first sale of
property, and which sale was set aside,*" *should be paid
the complainant bondholders* "*as between themselves.*"

In the same final decree (Part III, p. 66) full provi
is made for the protection of the payers of the dividen
the excluded bonds as follows:

"In making distribution, any bonds on which a
centage has been paid in cash to former holders,
credited thereon for money paid into court under the
sale of said property, shall be controlled by the perso
persons so paying the money into court for the pur
of reimbursement of such money so paid, and the pe
so paying said money shall be entitled to receive all
dends that such bonds may be entitled to until they
reimbursed the amount so credited on said bonds and
terest thereon at 8 per cent. per annum. And the o
nal holders of said bonds are not entitled to receive
percentage on said bonds until after the amount so
vanced is repaid to the person so advancing it."

And yet this same court, in insisting upon the imp
tion of the condition of paying in this ten thousand
lars, gave the ground of its action as follows:

"The judgment of the court was that restitution sho
be made only on condition that the amount of money
into court by the purchasers should be repaid to them
fore possession would be restored. As stated in the o
ion alluded to, the effect of the judgment of reversal
not only to set aside the decree, but, as it seemed, to an
subsequent proceedings. Still, when the purchasers of
property paid into court the $10,000, they paid it unde
decree valid and subsisting at that time, *and they really p
the money for the benefit of the Huguley Manufactur
Company. The money was paid into court and paid*

for costs due by them, and on their debts, and they received the benefit of it. Certainly not to require repayment to the purchasers of this amount before restitution would seem to be inequitable. This much is stated now, as it was stated orally at the time of rendering the decree for restitution," etc.

Robinson *v.* Alabama and G. Mfg. Co., 67 Fed. Rep., pp. 194–5.

As will be seen later on, this is not the only instance where the court has "blown both hot and cold" as to the rights of these petitioners.

The purchasers went into possession of defendants' property on September 16, 1892.

The judgment was reversed May 30, 1893.

The application for restitution was made July 10, 1893 (Part II, pp. 1–8).

It was renewed and refused September 22, 1894 (Part II, pp. 239–240), after the purchasers had been in possession for more than two years, of which period sixteen months had elapsed since the reversal of the decree.

The court even refused to order a reference to take an accounting of the rents and profits during this clearly illegal detention, except upon the condition that the defendants first pay in the $10,000 (Part II, pp. 239–242). And even after it had entered this order the court cancelled it on the same day, on the ground that the "subject-matter was covered by other orders." (Part II, pp. 244-5.) So that the defendants were left out of possession of their property, with no judgment or decree against them, face to face with a coming foreclosure, and even denied the right to have an accounting before the same master, who was taking an account of the mortgage debt, of the rents and profits due by the very persons to whom the mortgage debt was due.

The only relief obtained in the Circuit Court of Appeals from these manifest errors and injustices was an affirmance,

with the suggestion in the opinion that defendants were entitled to an accounting.

Alabama and G. Mfg. Co. *v.* Robinson, 72 Fed. Rep. 709.

XI.

When the second mandate of the Circuit Court of Appeals came down, affirming the decree of foreclosure, with an opinion declaring that defendants were entitled to an accounting from the complainants of the rents and profits of defendants' property, and the court entered an order directing such accounting to be made before a special master, it was the duty of the court to stay the sale as requested by the defendants until such report could come in, in order that the amount of such rents and profits could be applied to the reduction of the decree in case the court should hold, as it afterward held, that they were so applicable. Opportunity was given to the court to correct this error when application was made to confirm the sale, but it persisted in that error. The refusal of the Circuit Court of Appeals to consider this gross inequity, specially assigned as error, amounted to a denial of justice by said court.

The Circuit Court was induced to retire from the position that defendants were not entitled to an accounting for rents and profits by the following clause in the opinion of the Circuit Court of Appeals:

"The Circuit Court having decreed that the defendants were entitled to restitution on condition, which decree was not fully executed because the condition was not met, and having decreed a foreclosure and sale of the property, will, of course, have an account taken of the proper receipts and disbursements incident to the custody and operation of the mortgaged property, *and of the rents and profits earned, or that should have been earned since its delivery to the purchasers under the former sale, and make such further orders*

in reference to the conflicting claims of parties in the distribution of the proceeds of the sale and ultimate settlement of the proceedings as to justice and equity may appertain."

Surely a court of equity ought to have construed that sentence as directing it to hold up the sale until such accounting should come in of such rents and profits, due by the very persons in whose favor the decree of foreclosure had been entered. Particularly ought such a court have been moved to such a construction, when it knew that defendants had at that time been kept out of possession "of a large and going factory for the manufacture of cotton goods, employing many operators, carrying a considerable stock of quick assets," for *three years and eight months* (the mandate of the Circuit Court of Appeals was filed in the lower court March 10, 1896), when it knew that the profits of the operation of this property had been pocketed by the mortgage creditors, when it knew that it had adjudged that these profits belonged to defendants, and when it knew that these profits were, in its opinion, applicable to the payment and extinction of the mortgage debt.

The refusal of the court to stay the sale until the report on rents and profits could come in, and the order of the court in confirming said sale, made while the reference on said report was pending, was, in the language of your honors, used in the case of Chicago and Vincennes Railroad Co. *v.* Fosdick, 106, p. 75, speaking of the rights of a mortgagee, "a substantial and serious wrong," and a grave infringement upon defendants' right to redeem, which your honors also declared in that case (p. 71) a "favorite equity."

The decree of foreclosure in this case was for $45,000 of principal, with 8 per cent. per annum from November 1, 1894, and $17,005.92 past accrued interest; and defendants were ordered to pay this sum, $62,005.92, with 8 per cent. interest on $45,000 thereof, from November 1, 1894, within

twenty days, and under the decree they could not escape foreclosure unless they paid this sum. The court found, long subsequent to the sale, made the second Tuesday in May, 1896, that on April 30, 1896, there was due to the defendants by the purchasers, $35,857.54. If this sum had been then deducted from the decree, as it ought to have been, these defendants could have redeemed their property and prevented a sale by paying only $26,148.38.

The difference between the ability of a corporation divested for three and two-thirds years of the possession of its only asset, a going cotton mill, to raise $62,005.92, and to raise $26,148.38, is very great, especially in the South, where capital is scarce and hard to get, and particularly was this true in 1896, when the whole country was in the throes of a financial convulsion due to the free-silver agitation.

Defendants in their opposition to the confirmation of the sale (Part III, p. 23), offered to bid $200,000 for the property, if the court would set aside the sale and allow their claim for rents and revenues to be determined before said property should be sold.

We presume to assert that it is a primary and fundamental principle of equity that where a mortgagee gets into possession without a foreclosure, or under a foreclosure which is vacated by reversal or by fraud or otherwise, the mesne profit should be credited on the debt.

An instructive illustration of this principle is found in Fort *v.* Roush, 104 U. S., p. 142, where this court reversed a decree for rents and profits against a mortgagee, whose title, taken under a foreclosure decree, had been annulled, because the amount due on that decree had not been reduced and cancelled by the amount due on the foreclosure decree.

It might have happened, and as we conscientiously believe

ought to have happened, that in addition to the $44,367.66 of patent errors proven on the face of the forged books, and admitted by the accounting parties, the report of the master on mesne profits should have shown a balance due defendants exceeding one hundred and seventy-five thousand dollars ($175,000.00). We base this opinion on the conclusive testimony in the record, ignored by the master under his ruling as to the meaning of wilful default, concerning the previous record of this same mill, and the contemporaneous record of other mills in the same State engaged in the same business. One understands the necessity of producing *false and forged* books when the effort is to maintain that a mill operated by an unfreezable water power, during a fairly prosperous period, with 159 looms and 5,692 spindles, consuming 5,415,999 pounds of cotton, and producing 9,159,561 yards of duck, lost in three years and eight months $4,654.60.

We say, therefore, it might have happened that such report would show such a sum—more than sufficient to wipe out the whole mortgage debt thrice over.

Whether the amount so due be greater or less than the mortgage debt the principle remains the same.

To deny relief where the mortgage debt is reducible by one-half differs from denying relief where the mortgage debt is paid thrice over, only in degree but not in kind.

We have no means of accounting for the action of the Circuit Court of Appeals in ignoring the assignment of this and other vital errors made on the record and urged upon their consideration.

We have always been of the opinion, perhaps erroneous, that a litigant has the same right to ask the judgment of a court of last resort on his material assignments of error that he has to ask a decision from a *nisi prius* judge on the separate material averments of his declaration, and

that to constitute justice every substantial question which involves a right to life, liberty or property must be stated, considered and decided.

It is from this point of view that we charge that the failure of the United States Circuit Court of Appeals to state, consider and decide this and the other material assignments ignored by it "*amounts to a denial of justice.*"

XII.

The only justification in law or equity which the courts below could bring forward for the refusal to stay the sale of defendants' property until an accounting could be had for rents and profits, and for confirming said sale when made, was that the rents and profits belonged to the Huguley Manufacturing Company and were not applicable to the payment of the mortgage debt, for which that company was not personally bound. Therefore, after having refused to postpone the sale, and after confirming it when made, it was error for the court to apply the amount found in favor of the Huguley Manufacturing Company for rents and profits to the satisfaction of an alleged balance on a decree rendered only against The Alabama and Georgia Manufacturing Company.

This proposition is self-evident. If there were no right or equity to stop this sale until it could be sold only for the amount actually due on the mortgage, by the application thereto of the amounts due by the holders of the mortgage bonds for years of rents and profits of the mortgaged property, then such want of right or equity could arise only out of the fact that the Huguley Manufacturing Company, who was not personally bound for the mortgage debt, against whom no decree had been sought or rendered for the debt, was the sole owner of such rents and revenues, and that they were not applicable to the payment of the mortgage debt.

One or the other horn of the dilemma must point the truth.

If the rents and profits were applicable to the mortgage debt, then it was a gross wrong and inequity to sacrifice defendants' property under a decree for more than was due on the mortgage.

If the rents and profits were not applicable to the mortgage, then it was proper for the court to refuse to stay and to confirm the sale, but it was wrong and inequitable to apply rents and revenues to the payment of the deficiency due on the mortgage after the sale, under a personal decree against the other party defendant.

In this connection, and without undertaking to do more than state a few general propositions of law applicable to the case at bar, and cite a few authorities in support, appellants respectfully submit as follows:

First. The Huguley Manufacturing Company entitled to the rents and profits on general principles of law..... 64–72

Before citing the authorities, we premise that they fully sustain three propositions:

(1st.) That the mortgagor or his assigns is entitled to the possession and to the rents until such possession is lawfully terminated.

(2d.) That in the absence of foreclosure proceedings, such possession cannot be terminated by a trespass or without the consent of the mortgagor or his assignee; and, lastly—

(3d.) That during proceedings in foreclosure, the rents and profits can be intercepted only through a receiver lawfully appointed.

These lead to the resultant proposition that if possession

is acquired otherwise than in one of these lawful modes, the mortgagee is liable to the mortgagor or his assignee for the rents and profits, and that in a suit to recover them, neither the existence of the mortgage nor that the rents are specifically pledged, can be pleaded in defense. *Ex parte* Walter Bros., 89 Ala.

FIRST AS TO THE GENERAL RIGHT OF THE MORTGAGOR OR HIS ASSIGNEE TO POSSESSION AND THE RENTS AND PROFITS UNTIL LAWFULLY TERMINATED.

Freedman's Savings & Trust Co. *v.* Shepherd, 127 U. S. 494.
Teal *v.* Walker, 111 U. S. 242.
Grant *v.* Ins. Co., 121 U. S. 117.
Central Trust Co. *v.* Wabash R. Co., 30 Fed. 332.
Omaha Hotel Co. *v.* Kountze, 107 U. S. 609.
(See Kountze *v.* Omaha Hotel Co., 17 Otto, 378–402).
Am. & Eng. Enc. of Law, p. 823, citing—
Scott *v.* Ware, 65 Ala. 174.

As far back as 1846, in Davis *v.* Anderson, 1 Ga. 176, the Supreme Court of Georgia decided:

"A mortgage in Georgia is nothing more than a security for the payment of a debt, and the title to the mortgaged property remains in the mortgagor until foreclosure and sale in the manner pointed out by the statute."
Reaffirmed in Ragland *v.* Justices, 10 Ga. 66.
Elfe *v.* Cole, 26 Ga. 197.
Vason *v.* Ball, 56 Ga. 269, 270.

In the case of the United States *v.* Athens Armory in 35th Ga., page 344 (5), the United States Circuit Court for the Northern District of Georgia, follows this rule as being the proper one for the Federal Courts. Judge Erskine, de-

livering opinion, says: "A mortgage in Georgia is only security for a debt; the title to the property remains in the mortgagor. This is fully settled as a rule of property by a series of State adjudications, and where such is the case the Federal Courts adopt the decision of the State Courts." (This was a decision of the Federal Court deemed of sufficient importance to incorporate it in the Supreme Court Reports of the State.)

In the case of Green *v.* Coast Line Railroad Company, 97th Ga., the court holds that unless a mortgage upon property be also upon the income, a mortgagee out of possession has no claim upon the income. They say, further, that this is true in Georgia, although the income accrue from the property while in the hands of a receiver, citing the case of Vason *v.* Ball, 56th Ga., page 268.

Sec. 2725 of the Civil Code of Georgia, is as follows: "A mortgage in this State is only security for a debt, and passes no title."

This doctrine is not confined to Georgia, but is the prevailing doctrine in the United States.

See adjudication by Newman, J., Part II, pp. 233–9, and by Court of Appeals (McCormick, J.), 72 Fed. 708, *et seq.*, awarding and confirming rents in favor of the Huguley Manufacturing Company as movant and intervener.

No Deficiency Decree was Prayed in the Bill.

That it was necessary to pray specifically in the bill, for a decree over for the balance, see—

Windsor *v.* McVeigh, 93 U. S. 274 (23: 914).

The Amount Ascertained was not Due when the Bill was Filed.

See Alabama & Georgia Mfg. Co. *v.* Robinson, Trustee, 56 Fed. 690–3.

Ohio Central Ry. Co. *v.* The Central Trust Co. of N. Y., 133 U. S. 561–4 (S. C. Rep. ed. Bk. 33, 83–92).
Fosdick's Case, 106 U. S. 48, 71.
Wiltsie on Mortgages, citing—
Skelton *v.* Ward, 51 Ind. 46 (1875).
Howe *v.* Lemon, 37 Mich. 164.
Dunkley *v.* Van Buren, 3 Johns. (Kent) 330; Reviewed 100 Ill. 279.

There was no "Deficiency" to which the rents could be applied, and if there was it had not been ascertained so as to authorize a judgment or decree for same.

First. Amount bid had not been paid when decree of June 4, 1898,, ascertaining the alleged "Deficiency" was rendered, nor had sale been confirmed.

Noonan *v.* Braley, Admr., 67 U. S. (See S. C. Rep. ed. 2 Black, 499–509).
Orchard *v.* Hughes, 1 Wall. 73–7.
Jones on Mortgages, Vol. 2, Sec. 1709.

Second. Right of the Huguley Manufacturing Company, *res judicata.*

See—

Opinion of Newman, J., 2d P. Rec., Part II, pp. 233–239.
Opinion of McCormick, J. (C. C. A.), affirming, but *ordering accounting*, 72 Fed. 708, *et seq.*

Third. The Huguley Manufacturing Company *did not*, by purchasing the equity of redemption, become liable for the debt secured by the prior mortgage.

Fourth. No valid reason shown, even if question were open, why the fund ascertained to belong to the Huguley Manufacturing Company should be applied to the mortgage debt.

Fifth. The bondholders lost their right to apply the rents and profits, even if they ever had a right to them.

Sixth. Set off. The recovery of the Huguley Manufacturing Company cannot be set off against the mortgage debt.

Jones on Mortgages, Sec. 772.

The Zouave, 29 Fed. 296.

XIII.

10. The decree of October 15, 1898, was grossly erroneous.

(*a*) *It permitted the purchasers to set up as the ground for non-compliance with the decree of confirmation entered two years and five months before, the very ground which defendants in vain urged as a reason why the sale should not be confirmed.*

We suggested, in a previous paragraph of this brief, that there was more than one instance on this record where the court had "blown both hot and cold" as to rights of these petitioners.

At the time petitioners were pleading for a postponement of the sale, and resisting its confirmation, they set up the pending reference as to rents and profits as the ground and reason why the sale should be postponed and why it should not be confirmed when made.

The court adjudged this ground invalid for the purpose, ordered the sale, and confirmed it *conditionally* when made.

Two years and five months later the very persons who had urged the sale and its confirmation, and had induced the court to hold that the ground set up was not valid, came back to the court and *set up this very ground as a reason why they had not complied with the order of con-*

firmation, and asked for essential modifications and changes in the decree of confirmation. Against the earnest opposition of petitioner the court maintained their petition.

Their assignment of errors on this matter said (Part III, p. 95):

"Appellants insist that if the pendency of said reference and absence of a report were not a valid ground why the sale should not be confirmed, it is not a valid excuse for failing to comply with its terms, and that the court, therefore, erred either in overruling the said objections to confirmation, or in holding said excuse to be valid."

Where is there any possible escape from one or the other of these propositions?

Were not the petitioners entitled to have an answer to their cry for relief from these judgments, or from one or the other of them?

Did they not involve the question of the divestiture of their title to a valuable property?

We confidently know that this court will heed our cry and give us relief.

(*b*) *It deprived the defendants, the Huguley Manufacturing Company, of the rents and profits of its property, possession of which had been detained by the purchasers not only for the three years and eight months, from September* 6, 1892, *to May* 6, 1896, *but for said two years and five months, from May* 6, 1896, *up to October* 15, 1898 (*over six years*), *without title, and without having complied with the terms of their purchase, and arbitrarily fixed the liability of the purchasers during that period at* 7 *per cent. per annum interest on the balance due as the purchase price, in contravention of the jurisprudence of the Circuit and of this court.*

In Chicago and Vincennes R.R. Co. *v.* Fosdick, 106 U. S. 71, this court said:

"It is the deed made to the purchaser, actually transferring the title of the parties to the suit, that terminates the mortgagor's equity of redemption."

Full compliance with the terms of the sale by the purchaser is necessary to entitle him to the deed. Until he so complies the purchase is inchoate and incomplete. The order of confirmation consists essentially of two parts: First, the approval of the court of the price bid at the sale; second, an authorization to the master to receive compliance with the bid from the purchaser to and to make him a deed. Such was the order in this case (Part III, pp. 24–5):

"It is ordered, adjudged, and decreed that said sale be, and the same is hereby, confirmed in all respects, and that Samuel C. Dunlap, as such commissioner, be, and he is hereby, authorized and directed to convey to said purchasers all and singular the property and the property rights of every description described in said decree, *upon the purchaser's complying with the terms of said sale.*"

Rents accruing between the day of sale and the delivery of the deed belong to the owner of the equity of redemption.

Clason *v.* Corley, 5 Sandf. 447.
Astor *v.* Turner, 11 Paige, 436.
Mitchell *v.* Bartlett, 52 Barb. 319.

The very question presented by this record on this point was decided in the Circuit Court of Appeals for the fifth circuit, a year before this case was decided, in two very important cases, where large sums were involved—the revenues of a railroad. Boyle *v.* Farmers' Loan and Trust Company, and Huntington *v.* Same, 88 Fed. Rep. 930, C. C. A., Vol. 32, p. 142.

In those cases the Court said:

"Neither in law, nor in equity, is the purchaser under the foreclosure entitled to the earnings of the property since the decree of confirmation, because, among other things, *he has persistently delayed complying with his bid.*"

Ought not the petitioners in this cause to have received the same measure of justice that was meted out in those cases?

Suppose the lower court in those cases had given the revenues to the delaying purchaser from the date of the bid, and had arbitrarily directed the purchaser, in lieu of surrendering revenues, to pay 7 per cent. interest on the amount of his bid from the date of the confirmation; would not the Circuit Court of Appeals have been compelled to reverse that judgment?

Were they not, therefore, compelled to reverse the judgment in this case?

Was not the rent of this large and valuable mill for over six years a real and substantial issue on which the petitioners were entitled to have a hearing, and entitled to have decided according to the jurisprudence of this court and of the very court to which appeal was made?

(c) *It permitted the purchasers to credit on their bid the ten thousand dollars, with interest from the date of the first to the date of the second sale, paid in on account of the first sale, which had been distributed in the payment of debts and claims for which neither defendants nor their property were liable, full provision having been made for all these debts and claims in the final decree by adjudging in favor of defendants that* $4,102.50 *thereof should be paid by the bondholders themselves, and that the bondholders who had received the balance of the ten thousand dollars should receive no dividend on these bonds until the payers of the money into court should be reimbursed the amount received on the bonds.*

The purchasers at the second sale were not entitled to the deduction of the ten thousand dollars paid in at the first sale.

That sum had been disbursed in paying partly their own debts, decreed against them in the final decree of June 4, 1898 (Part III, p. 65), being the costs of the first sale amounting to $4,102.50, and partly the bonds of Mrs. Huguley, specially excluded from the benefits of the final decree of foreclosure. Full provision was made in the decree of June 4, 1898, as to these bonds and the payment thereon. See paragraph 8 of the decree. (Part III, p. 66.)

The effect of this decree of October 15, 1898, was to reverse the decree of June 4th, and to make the *petitioners'* property bear the burden of the costs which had been adjudged in *their* favor.

(d) It diminished the price of the sale by relieving the property from liens in addition to the price bid, laid upon it in favor of the Huguley Manufacturing Company by order of the confirmation of which liens were thereby taken off the property and charged against and made payable out of the price.

The decree of confirmation of the sale declared a lien in favor of the Huguley Manufacturing Company on the property in the hands of the purchasers, for any amount found by the master in excess of the deficiency due by the defendants to complainants in the foreclosure proceedings.

This portion of the decree of confirmation was supposed to be a sop to the Huguley Manufacturing Company in compensation for the court's refusing to maintain its objection to the confirmation of the sale.

The purchasers, by accepting that decree of confirmation, took it in all its parts and agreed to pay the price bid,

$66,000, *and in addition to that any other sum that might be found due on the pending reference.*

In their quality of purchasers only, Lanier and his associates had no interest in the pending reference.

Central Trust Company *v.* Grant Locomotive Works, 135 U. S., p. 207.

Swann *v.* Wright's Executor, 110 U. S. 590.

Compton *v.* Jesup, 167 U. S., pp. 1–35.

If the amount found due on that reference had been the $228,000, which the evidence adduced by the Huguley Manufacturing Company established in its favor, it would still have been a lien on that property in the hands of the purchasers.

That provision in the decree was intended to give security to the Huguley Manufacturing Company for the claim it was *then* and is *still* litigating.

In addition to the sum for rents and revenues there was also found by the master, in favor of that company, a judgment for $2,500, with $894.04 interest for property of that company taken possession of and converted by the purchasers. The court, in the final decree of June 4, 1898 (Part III, pp. 64–7), refused to set off this sum (less $750 costs) against the mortgage debt, and declared a lien on the property therefor in the hands of the purchaser. The proceeds of the sale which belonged to defendant's debtors, the mortgage creditors, could not be used to pay this debt. It was to be paid by the purchaser in addition to his bid. The court ordered the lien for this sum to be wiped off the property in the hands of the purchaser, and the amount thereof to be paid out of the purchase price, paid into the court. (See amendment to decree, Rec., p. 154.) It ordered all the claims of the Huguley Manufacturing Company to be transferred from the property to the fund in court, and permitted

the purchaser to pay into court only $43,433.36, with seven per cent. from May 6, 1896, when the amount that ought to have been paid in to release the property (*leaving out of view entirely the litigated claims for rents and profits*) was $66,000.00 due on amount bid and $2,644.04 due the Huguley Manufacturing Company for its converted property, with interest from date of purchase. It thus gave the purchasers an unencumbered title to the property for $48,433.36, with interest on $43,433.36 from May 6, 1899, when on the face of the papers they had agreed to pay a minimum of $81,173.69, *and to hold the property subject to any further sum the Huguley Manufacturing Company might receive.*

(c) *It subordinated the lien of the claim of the Huguley Manufacturing Company to the lien of the claims of the solicitors of the bondholders for service performed in their behalf, who, by the final decree, were given a lien only as against such bondholders, and directed payment to them of* $7,000 *out of the funds paid in by the purchaser, thereby diminishing to that extent the security of the Huguley Manufacturing Company, under the same decree which relieved the property of their lien and referred it to the fund so paid in.*

See final decree, Part III, pp. 65 and 74, making the solicitors' fees of Dorsey, Brewster & Howell a lien only "as between the bondholders themselves." See decree on petition of Lanier for absolute deed, Part III, p. 74, which orders the clerk to pay these gentlemen immediately out of the fund in court $7,000, "the same having been by a previous decree of this court adjudged to be prior liens on said proceeds *in preference to all other claims.*" To this fund, thus diminished by the payment of the personal debt of the bondholders, the claims of the Huguley Manufacturing Company are referred.

XIV.

The Hugnley Manufacturing Company, having been made a party defendant only to bar its equity in the mortgaged property, and no other decree of any kind having been entered against it, and having prevailed in its application for an accounting for the rents and profits, it was contrary to the principles of right and equity to decree against it all the costs and fees of the reference on which the accounting was had, and other costs of the cause, amounting to $4,132. The action of the lower court in this regard was purely arbitrary, and was without any assigned cause or reason, and the refusal of the Circuit Court of Appeals to notice this specially assigned error amounted to a denial of justice.

While it is true, as a general rule, that costs in equity are discretionary with the chancellor, yet "discretion is a science not to act arbitrarily." (Rock's Case, 5 Rep. 99, b.; Burgess *v.* Wheate, 1 W. Black., R., p. 123.) They generally follow the decree, and "the unsuccessful party must show the existence of circumstances sufficient to displace the *prima facie* claim to costs given by success to the party who prevails."

2 Dan. Ch. Pr. (5th Ed.) 1381.
Beach Mod. Eq. Pr., Sec. 1004.

No ground was shown in the lower court why the accountants who resisted the demand for an accounting, who contested the items of their liability, who were adjudged liable to account, and against whom a large amount was found, should not pay the costs incurred in bringing them to justice.

While the record shows on its face that the Circuit Court, after holding out to its original insistence that as

"condition precedent" to regaining possession the Huguley Manufacturing Company must pay into court these costs and attorney's fees, etc., nevertheless it *receded* from this position as late as June 4, 1898, and then decreed that same should be taxed "*as between the bondholders themselves.*" (Part III, p. 65.)

Appellants insist again that notwithstanding said circuit gave this express direction to the matter of costs, it yet passed still another decree, under date of October 15, 1898, in effect not only charging against them all items claimed as "*costs*," but added thereto $7,000.00 of attorney's fees of the West Point (or Galeton) Cotton Mills and Lanier, which, with other items aggregating $16,282.50, were *all* finally taxed at the door of these appellants (Part III, pp. 65, 74, 88–9), and this contrary to the very adjudication of said Circuit Court as late as June 4, 1898, as pointed out. Such utter inconsistency and contradiction on part of said Circuit Court, and that, too, within a period of less than four months, appeals to this court for correction since our assignments of error covering same, urged in the Circuit Court of Appeals, were ignored.

XV.

Rights of lien-claimant; acquiescence in decree; purchaser at foreclosure sale subject to liens established or to be established, bound thereby, and cannot object to enforcement of lien or a resale; trust relation set up, involving accounting for rents and profits.

While appellants contend that the pretended sale of May 6, 1896, absolutely failed, and was utterly void for non-compliance, in any event, if it could be held to be a sale, said sale was, by decree of the Circuit Court, of June 25, 1896,

confirming, in part, said sale, expressly subject to the following prior lien for rents and profits, etc., there and then vested in them, which could not be taken away nearly three years afterwards, at the mere *dictum* of said court. This was pointed out in their petition for a rehearing before the Circuit Court of Appeals (Part III, p. 99). We quote:

"3. An order of reference having heretofore been entered in this cause directing Thomas B. Fielder, Esq., to ascertain and report to the court certain claims for rents, profits, wastes, and conversions in respect to the said property, and said investigation now being in progress before said special master, it is ordered, adjudged, and decreed that should the said accounting finally result in a judgment in favor of the Huguley Manufacturing Company, then such judgment, for any amount thereof in excess of any deficiency due by the defendants to the complainant in the foreclosure proceedings, shall, for such excess, be *and remain a lien upon said property in favor of the Huguley Manufacturing Company, as against the purchasers at said sale or any persons holding under them.*

"*And the court retains and reserves the right to seize and order a sale of said property for the purpose of satisfying any such balance so found to be due as hereinbefore set out, and the title shall be made by said commissioner to the purchaser, subject to this provision.*"

Part III, page 25.

In Compton *v.* Jesup & Dixon, Trustees, 167 U. S. 55 (See S. C. Reporter's Ed., pp. 1–37), it is held in the head notes as follows:

"The right of a lien-claimant, reserved in a foreclosure decree which provides that if his lien is established he shall be paid a certain sum, in default of which the court shall resume possession of the property affected by his lien, and enforce the decree rendered in his favor 'by a resale of such property or otherwise, as this court may direct,' in-

cludes the right to a resale of the property, and is not limited to a redemption thereof.

"Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien-claimant, and who participate in the benefits of an early sale thus secured, cannot object to the enforcement of the lien in the manner pointed out in the decree.

"A purchaser on a foreclosure sale cannot object to the terms of a decree of sale which provided for a resale on certain conditions.

"A purchaser of a railroad on foreclosure, under a decree reserving the rights of a lien-claimant, holds a trust relation which involves an accounting until the lien is disposed of."

See Compton *v.* Jesup, 167 U. S. 55.

This case is so perfectly analogous to the case at bar that it is deemed best to quote therefrom the following extracts from the opinion of Mr. Justice Shiras (decided in 1897), who held as follows:

"We think that these observations (on part of the lower court) show a plain disregard by the learned court of the terms and obvious meaning of the decree of March 23, 1889. When the terms of that decree were fixed, all parties to be affected thereby agreed to the same. The issues raised by the pleadings as to Compton's claim were *still pending and undetermined.* It was evidently the wish and the interests of all the parties to have the sale effected at once; and in order to avoid the further delay that would be occasioned by awaiting the determination of these issues, the provisions or reservations in Compton's favor were put in the decree."

[In case at bar no such consent was had, but that sale resisted.]

* * * * * *

"When, etc. * * * we do not think it was open for the court, consistently with the terms of the decree of

March 23, 1889, to deprive Compton of the rights and remedies therein conferred. * * * When the Circuit Court speaks of a resale as inequitably affecting the rights of the prior lien mortgagees and of the purchasers who have succeeded thereto, it is evident that the court overlooked those provisions of tne decree which, in express terms, subjected such purchasers to Compton's rights to a resale, if they do not choose to pay him the sum awarded by the decree. So when the court says that Compton could as well have been a bidder at the sale as at a resale, if one be ordered, it omits to notice that when the sale took place under the decree, Compton's claim was *undetermined*, but that provision had been made for him in the event that his claim was held valid. He could not safely bid because he could not foresee whether his claim would be allowed, and the arrangement made relieved him, very properly, from the perplexity to which he would have been subjected if the sale had been unconditionally made, when the fate of his claim was uncertain."

* * * * * *

[In case at bar the Huguley Manufacturing Company proposed to bid $200,000.00 for the property if the court would postpone the sale until the coming in of the master's report. Part III, p. 23.]

"The decree of March 23, 1889, under which the sale was made and confirmed on May 18, 1889, was, in all essential respects, the final decree in the case, the questions reserved being merely incidental to carrying the decree into full effect. That portion of said decree which established Compton's rights was, in its nature, final; the only matter which was kept in reserve as respects Compton was the awaiting the determination of the validity and the amount of his claim by the report of the special master. And it may well be doubted whether it was competent for the Circuit Court, at *a subsequent* term, to *disturb the rights of Compton*, defined and adjudicated at a *previous* term in the final decree of sale."

The court, after reviewing the case of Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, and of Swan *v.* Wright's Executor (Swan *v.* Fabyan, 110 U. S. 590), concludes:

"But we think the better view is that the Wabash Company should be regarded as a party in possession under the express terms of the order of sale, and as representing all parties in interest, including Compton; and hence cannot claim to be an absolute purchaser of the rights of a mortgagor not subject to account for rents and profits. In that point of view, there is a trust relation which involves an accounting until Compton is disposed of."

Compton *v.* Jesup, 167 U. S. 55.

The same principle is upheld by this court in other familiar cases.

Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 227.

Kneeland *v.* Am. Loan & T. Co. of Boston, Sup. Ct. ed. 34: 379.

Markey *v.* Langley, 92 U. S. 701.

Whiteside *v.* Haselton, 110 U. S. 152.

Stewart *v.* Gay, 127 U. S. 518.

Freeman on Judgments, Sec. 208.

Norton *v.* Nebraska Loan & T. Co., 35 Neb. 466, and cases cited.

XVI.

Mode of sale prescribed by mortgage must be followed on foreclosure—mortgage sales in equitable proceedings ordinarily made for cash.

Markey *v.* Langley, 92 U. S. 701.

Olcott *v.* Bynum, 84 U. S. 570.

Demarest *v.* Wyncoop, 3 Johns Ch. 34.

Chilton *v.* Alabama Gold Life Ins. Co., 74 Ala. 290.
Ex parte State Bank, 15 Ark. 264.
Dolan *v.* Mayor of Baltimore, 4 Gill, 405.
Nebraska L. & T. Co. *v.* Hamer, 58 N. W. 695, Am. Dig. 1894.
Wiltsie on Mortgage Foreclosure, Sec. 182, p. 587.

In the case at bar, the trust deed expressly stipulated and provided that in event of sale the property had to be sold for spot **"cash."**
Part I, p. 8.

XVII.

The court without power to change the terms of sale and then confirm—should either confirm or set aside the sale, but cannot modify its terms—cannot reverse, annul, or modify decree after end of its term. Such an act would have no validity.

In Rorer on Judicial Sales, Sec. 126, p. 57, it is said:

"But it (the court) cannot change the terms of sale and then confirm. Such an act would have no validity."
Ohio Loan and Trust Co. *v.* Goodin, 10 Ohio St. (N. S.) 557.
Renz *v.* Hines, 3 Kansas, 390.

To same effect, see:

Compton *v.* Jesup, 167 U. S. 1–37.
Central Trust Co. *v.* Wabash, St. L. & P. Ry. Co., 30 Fed. 332.
Black on Judgments, Vol. 1, Sec. 154.
Beach's Mod. Eq. Prac., Sec. 850, and cases cited.

XVIII.

The court without power, after the adjournment of its term, to change the "parties" to a sale. Deed can only be made to the original bidder or purchaser. If bidder fails or refuses to complete the purchase and payment, another person should not be allowed to take the property at the former bid.

"Upon a sale by a master, if the bidder to whom the property is struck off refuses to complete the purchase, the master *should not allow another person to take it at the former bid.*"

Daniell's Ch. Prac., Vol. 2 (6th Ed.), Sec. 1282, p. 1267, citing Thompson *v.* Dimond, 3 Edwds. Ch. 298.

See also Freeman on Void Judicial Sales, Sec. 46.

Carpenter *v.* Sherfy, 71 Ill. 427.

Compton *v.* Jesup, 167 U. S. 55.

In view of the foregoing well-settled principles of elementary law, we find the Circuit Court, nearly three years after the adjournment of its term, not only changing the *terms* of sale from a spot *cash* basis of sale (with the alternative of payment in bonds, which, under Lanier's bid, required surrender of every dollar of the bonds, minority as well as majority) to a three-year credit sale (~~by~~ *rents*), but we further find the said court, as late as October 15, 1898, yielding to L. Lanier's petition, which expressly admitted and recited that even the majority wing of bondholders had deserted him and which refused to permit their bonds used in the bid, and in lieu of said "purchasing bondholders," changing the "parties" to said Lanier, *individually*, or to such others as *he* might designate.

That these are admitted facts, see :

"Petition of L. Lanier for deed absolute," Part III, pp. 67–9; "Answer (of Huguley Manufacturing Co.) to petition of L. Lanier for deed," Part III, pp. 69–72, and Judge Newman's "decree upon petition for deed absolute," Part III, pp. 72–74 (yellow cover).

XIX.

"*The proceedings before the master on the reference were conducted and the report of the master was made in violation of the terms of the reference and of the seventy-ninth rule in equity prescribed by this honorable court. The refusal of the Circuit Court of Appeals to consider this assigned error amounted to a denial of justice by said court.*"

The master's report bears on its face evidence of the truth of this charge.

The assignments of error state the details with minuteness, and it is unnecessary to repeat them here.

The decree was, of course, to be construed and executed by the master in conformity to the 79th and 76th Rules, as if the same had been written in the face of it ; and from the terms of the decree so construed, the master was not at liberty to depart. See—

Foster's Fed. Prac., Vol. 1, par. 307, p. 554, citing:

Farmers' Loan and Tr. Co. *v.* C. R.R. Iowa, 2 Fed. Rep. 656.

Gordon *v.* Hobart, 2 Story, 243.

"It is the duty of the master to obey the instructions of the court ; if he fails in this, or does not furnish in his report the facts necessary to enable the court to proceed to a

final decree on the merits of the case, the report should be set aside, *even if no objections are taken to it.*"

Lang *v.* Brown, 21 Ala. 179.

2 Daniell's Chan. Prac. (6th Ed.), Sec. 1298.

"Parties accounting before a commissioner should bring in their accounts in the form of debit and credit; and be confined to the matters referred to the commissioner, and arising strictly between the parties.

"And where the commissioner allowed accounts, kept by one of the parties in his books under various heads, and which did not allude to the other party, nor did they appear to have any connection with the dealings of the party to be charged, the report allowing such accounts must be set aside, and the matter again referred to have the statement corrected."

Reed *v.* Jones & Drury, 8 Wis. 421 and 462.

See Sheffield and Birmingham Coal, Iron and Railway Co. *v.* Gordon, 151 U. S. 285.

XX.

The action of the master in admitting as evidence books and vouchers of the complainants without proof of their identity, verity or contents by those who kept the books and made the vouchers, in excluding the books when they were shown to be forged, in refusing to exclude the vouchers, and then in continuing to use the excluded books and the unproved vouchers as the basis of the accounting, was error of such a nature as to vitiate his whole report.

The refusal of the Circuit Court of Appeals to consider this specially assigned error amounted to a denial of justice by said court.

The single episode of the forged books, shown to be in the same handwriting as that of the account sales of Boynton & Co., the sellers of the product of the mills, which

were tendered in evidence as the *original* books of the Galeton Cotton Mills, the ruling of the master that he would let them "come in as a memorandum," his use of them in basing his report upon their footings and deducting from the amount due respondents an alleged loss shown by them in the operation of the mills, were sufficient to condemn this whole report apart from any other consideration.

Even if they had been original these books were not admissible in evidence in behalf of the corporation. Wharton on Evidence, Sec. 662.

And, if admissible, their genuineness and correctness ought to have been shown by the testimony of the person who kept them. Wharton on Evidence, 1131; Chaffee & Co. *v.* U. S., 18 Wall., p. 541; Nicholls *v.* Webb, 8 Wheaton, 326; Ins. Co. *v.* Weide, 9 Wall. 617.

Even the pretended books produced were incomplete and worthless. There was no day-book, no cash-book, and no stock-book (*i. e.*, a book showing the product of the mill and its disposition), and it was, therefore, impossible to check the pretended ledger.

The pretended vouchers were in the same condition as the books. The testimony of no witness who made any voucher, or who knew the contents thereof, or who conducted the transaction it purported to certify to, was taken.

To check the *forged* books, let in "as a memorandum," by vouchers of this kind was a simple travesty, and to hold that the parties entitled to the accounting were bound by the results of these pretended books and vouchers, and that these documents conclusively showed what the actual rents and profits of the mill were, and that the burden of proof was on the defendants to attack the footings shown by these books, was a wide departure from the most elementary principles of right.

There was more than one circumstance to discredit and condemn these books.

In the first place, they were produced and offered as books of *original* entry, and were afterward shown to be *FORGERIES. No explanation was ever tendered of these facts.*

In the second place, they were shown to be in the same handwriting as the pretended account sales of the product of the mill.

In the third place, they were incomplete and not accompanied by any day-book, cash-book or stock-book.

In the fourth place, when first tendered and identified by Lanier, on February 17, 1897, they were written up only to January 1, 1896. Respondents demanded that they be impounded, and the master so ordered. By some means not explained they were abstracted, and when returned on the complaint of respondents, *were written up to August, 1896. No explanation was ever made of the mysterious additions to these books*, nor did Lanier, under cover of whose testimony it was sought to establish the entries on these forged documents (books and accounts sale) *up to* January 1, 1896, ever *again* resume the witness stand for purpose of verifying that portion of said books which had been thus posted *between* said periods of January 1, 1896, and August, 1896. So that, even if the portion posted up to January 1, 1896, was not utterly discredited by the proven forgery, the latter remained unvouched for by any witness.

In the fifth place, these *forged* books were further discredited by flagrant errors and overcharges, etc., amounting to $44,367.66, which were *admitted* by defendant accounting parties, and allowed in favor of the Huguley Manufacturing Company, movants, under the name of "*rents.*" (Part III, p. 37.)

In the printed record certified up by the Clerk of the Court of Appeals and used by the undersigned on their petition for *certiorari*, and now a part of the record filed in this cause, will be found on pages 188–210, and likewise reproduced in the brief last filed under this appeal by McLaurin & Welles, and King & Spalding (white cover, pp. 46–64), certain testimony of John M. Chilton, solicitor for the Huguley Manufacturing Company, and of Jas. S. Hamilton, expert accountant, and also evidence and admissions of L. Lanier, taken before the Master at the close of the reference and on eve of submission of oral argument thereupon. The attention of this Honorable Court is invited to all this evidence as exposing a bare-faced fraud and conspiracy to palm off on a court of equity books—a ledger and journal—formally offered in evidence by the officials of the West Point Manufacturing Company and Galeton Cotton Mills, vouched for and insisted upon as being books of *original* entry, and yet "proven to the satisfaction of the Master" as patent *forgeries* by their "watermark" ("*1894*"). Appellees had relied solely upon these books, introducing no oral testimony in defence of a charge of $228,000.00 for rents due up to May 6, 1896, which the Huguley Manufacturing Company established by numerous witnesses of the very highest standing who testified in person, and whose testimony and exhibits, though admitted by the master, was afterwards ignored, he preferring to follow the forged books in preference.

The petition for an accounting was pending from March 13, 1893. The term of the accounting extended from September, 1892, to April 30, 1896. Therefore, accountants *were warned of their coming responsibility*. They could have made their accounting as clear as the noon-day sun, with a specification of detail and a wealth of original evidence of

confirmation that would carry conviction in any mind. They were business men and not greenhorns. They operated under the form of a corporation where discipline could be rigid and no divided counsels prevail. But it was their interest to show no profits. They were bound to operate the mill, and such a mill must make money. How conceal the fact that it did make money? Overcharge for cotton bought! One cent a pound on the amount consumed would reduce the profits $50,000. Undercharge for the goods sold! One cent a yard on the goods produced would reduce the profits $100,000. Pay enormous commissions, high rates of interest, large discounts on datings!

Every circumstance connected with this accounting was such as to induce a seeker after justice to scan every item and document produced by these parties with suspicion.

But how work all this so as to save for the accountants the real profits of the mill? Very simple. Let the individuals, who are the real parties in interest, buy the cotton, sell the product, receive the commissions, and charge the interest. And that is just what was done in this case. The commercial firm of W. C. & L. Lanier bought the cotton, and the commercial firm of N. Boynton & Co. sold the product, got the commissions, the discounts on the datings, and the interest. L. Lanier was one of the purchasing committee at the first sale, was the whole purchasing committee at the second sale, was president of the Galeton Mills and of the West Point Mills, to whom all the stock in the Galeton Mills had been sold. (Part II, pp. 83–4 and 231–2.

Horace Sears was treasurer of the Galeton Mills, and a member of that firm of N. Boynton & Co., and he and the other members of that firm were large stockholders in the West Point Mills.

The books of the Galeton Mills, showing what Lanier & Co. had charged them for cotton, were not enough. These persons were not the sellers of cotton but the mills' agents to buy. They could have shown, and their principals ought to have made them show, the date of each purchase, the marks of the bales, the places where bought, the price paid, and the names of the vendor; and their statements could then have been verified.

Surely the accountants owed this same obligation to the owners of the property!

Not knowing these facts, which the accountants ought to have been made to show, petitioners established what the average price cotton was, day by day and month by month, in the markets where this cotton was bought, and compared this with the average price of the cotton charged to the Galeton Mills by Lanier & Co., day by day and month by month, and demonstrated an enormous overcharge.

The master disposed of this demonstration by saying (Part III, p. 34): "The movant undertakes to establish such an inference by a comparison of the prices paid with certain average prices of cotton for specified months. It would seem that the proper way to show such overcharges, if they existed, *would be to show the date and amount of each purchase, and the market price of cotton in West Point on those days.*"

But there was before the master evidence to show these very facts in the very way he wanted them shown. The Galeton Cotton Mills' cotton book showed the date, number of pounds and price charged for cotton. The original cotton books of Atkinson & Turner, of West Point, Ga., large cotton buyers, were also in evidence, being offered by accountants. These two books were compared date by date, and they showed an overcharge for cotton amounting to $44,410.67.

The account sales of Boynton & Co., not identified by the man who made them, not verified by the oaths of the persons who conducted the transactions therein certified to, not accompanied with any proof of the disbursement of the enormous charges deducted from the gross proceeds, were not sufficient to show anything on earth except that such papers were in existence and had been sent from Boston by Boynton & Co. to the Galeton Cotton Mills.

Movants were driven to the same method of proof by average prices, day by day and month by month, to demonstrate a sale of the product below the market price. They made this demonstration beyond the peradventure of a doubt, and the master disposed of it as follows (Part III, pp. 34–5): "The movant introduced a number of witnesses who testified to the average prices of these classes of goods, and seeks to show, by a comparison of the average prices testified to by these witnesses with the average prices realized by the Galeton Cotton Mills, that the prices realized were far below what they should have been. It would seem that in impeaching the account of sales rendered by the respondent the movant ought to show that the goods at the time they were sold brought less than the market price of the same grade of goods at the time and place of sale, *and that the failure to realize the best price obtainable was by the wilful default of the respondent.* Neither of these propositions is shown by the evidence. While the evidence for the movant, in the shape in which it is presented, may suggest an inference that the goods sold for account of the Galeton Mills ought to have brought better prices, still the evidence *strongly indicates* that this product of this mill was not equal in quality to those goods to which the market price applies."

The testimony which gave this "strong indication" was that of Lanier, and Wellington, a partner of N. Boynton

& Co.—two interested witnesses, absolutely contradicted by J. S. Hamilton, Geo. W. Hamilton, Henry Harvey, T. A. Burke, R. J. Patton, Wilmer Moore, D. O. Dougherty Jos. Kingsbery, and W. S. Everett, all entirely disinterested and all engaged in the cotton duck business, as operators of competing duck mills *in the same* territory, or jobbers in duck.

But even then, allowing for all the depreciation in the quality of the duck made by the Galeton Mills, below standard duck, sworn to by these two men, and not one-third of the deficiency below the price realized was accounted for.

Wellington said the undervaluation, owing to lower quality, was from 2½ to 5 per cent. This would make 10-oz. duck, of which market value was 8.50 cents per yard, with 5 per cent. off, realize 8.07 cents, or less than one-half a cent per pound off.

Lanier said the undervaluation owing to quality was from one-quarter to one-half a cent a yard.

But the testimony showed an average deficit of 1.24 cents per yard all round. Even allowing full force to the claim of lower quality, there was an unexplained deficiency in price of .74 of a cent per yard. The allowance of this comparatively small deficiency would have made the accountants pay petitioners $62,665.84 on this item alone.

XXI.

The master's interpretation of the rule of responsibility of a mortgagee in possession, holding that "wilful default," meant fraud or wanton misconduct, and not "ordinary and reasonable diligence," was apparent in all of his findings. This was the gravamen of petitioners' exceptions in the court below, and was the complaint in the Circuit Court of Appeals-

The Circuit Court of Appeals misinterpreted and misconstrued the position of appellants, and decided this point upon the ground that the appellants wished to apply to the complainants some other or different or stricter rule than that of a mortgagee in possession. This action of the master and the court resulted in the rejection of claims of petitioners exceeding $190,000.

A mere inspection of the authorities shows that the words "wilful default" mean "want of reasonable diligence," and that the two expressions are used as the equivalents of each other.

In Daniell's Chancery Practice, 1237, it is said:

"Sometimes instead of the words 'without his wilful default' the words 'with ordinary care and diligence' are used."

Most of the cases use the terms "with ordinary care and diligence," or "reasonable diligence."

Brickell's Digest, Vol. III, 657.
2 Daniell's Ch. (6th Am. Ed.), p. 1239.
Miller *v.* Lincoln, 6 Gray, 556.
Hughes *v.* Williams, 12 Ves. 493.
Benham *v.* Rowe, 2 Cal. 387.
Schaeffer *v.* Chambers, 2 Halst. Ch. (N. J.) 548.
2 Jones on Mortgages, Sec. 1123.
Strong *v.* Blanchard, 4 Allen, 538.
White *v.* Atlas Lumber Co., 68 N.W. Rep. 359.
Richardson *v.* Wallis, 5 Allen, 78.

It is clear from the tone of the report and the rulings of the master that he did not use the terms as indicating a mere want of ordinary care and diligence, but used it in the sense of "fraud"—that the accounting parties were liable for only what they "actually earned" instead of

what they "should have earned," because they had been guilty of no fraud.

The master in his report shows what he meant by "wilful default."

In disposing of two claims, involving over $150,000.00, to-wit, overcharges on cotton bought and undervaluation of goods sold, he says (Part III, p. 35):

"Indeed, in regard to the claim of overvaluation of cotton bought, and undervaluation of goods sold, the undersigned thinks that the movant must stand by the actual results, until he can show that those results are materially different from what they should have been, and that they were brought about intentionally *or by neglect so gross as to amount to wilful default.*"

The rule of diligence as established by the U. S. Circuit Court of Appeals, fifth circuit, which became the law of the case in the accounting for rents and profits, etc. (See 72 Fed. Rep., p. 712):

"The Circuit Court having decreed that the defendants were entitled to restitution on condition, which decree was not fully executed because the condition was not met, and having decreed a foreclosure and sale of the property will, of course, have an account taken of the *proper* receipts and disbursements incident to the custody and operation of the mortgaged property and of the rents and profits *earned, or that should have been earned,* since its delivery to the purchasers under the former sale, and make such further orders, etc."

ORDER OF REFERENCE TO SPECIAL MASTER (IN CONFORMITY):

"It is ordered that this case be referred to Thomas B. Felder, Esq., for the purpose of taking an accounting of the *proper* receipts and disbursements incident to the custody

and operation of the mortgaged property, and of the rents and profits *earned, or that should have been earned*, since its delivery to the purchasers under the former sale; and to ascertain whether there has been any conversion of the property connected with said property, and the amount and value of the same; as to whether there has been any waste or damage to the property, and as to whether the same is the result of ordinary wear and tear; and as to the liability of the holders of the property therefor."

This March 16, 1896. (Part II.)

(See condensed printed record (on application for *certiorari*), p. 69).

Referring to the rule of liability or diligence, as expressly set forth in the orders quoted on preceding page, both of the Circuit Court of Appeals, fifth circuit, and also of Judge Newman, in conformity, it should be noted that Mr. Justice McCormick, who wrote the opinion in the Court of Appeals, employed the following significant and strong language in the same connection:

"This property was a large and going factory, for the manufacture of cotton goods, employing many operatives, carrying a considerable stock of "Quick Assets," *requiring competent, careful, and responsible handling.*"

72 Fed. Rep. 708.

So excellent an authority as Snell's Equity (American Notes by Lawson), defines the terms, as follows, "Gross and wilful negligence"—tantamount to "*Fraud.*"

See Hewitt *v.* Loosemore, 9 Hare, 458.

"If there be 'Wilful default or gross neglect' as to making repairs, the mortgagee is accountable. Need not show actual '*Fraud.*'"

Russell *v.* Southard, 12 How. (U. S.) 139.

2 Halst. Ch. (N. J.) 557.

In Hughes *v.* Williams, 12 Vesey, Jr., 493, it is said:

"Mortgagee in possession, though answerable, beyond fraud, for *wilful default*, is to take the fair rents and profits, not bound to engage in, and will not be allowed for speculation and adventure."

In the note to this case, it is said:

"By taking possession, the mortgagee imposes upon himself the duty of a 'Provident Owner,' and he is bound to recover what such an owner would, with 'Reasonable Diligence,' have received."

Again:

"A mortgagee personally in possession is responsible for 'reasonable' rent," citing:

Bainbridge *v.* Owen, 2 J. J. Marsh, 465.

The Lord Chancellor (Erskine) stated as follows:

"I do not mean to say that to charge a mortgagee in possession, '*actual fraud*' is necessary. It *is sufficient*, if there is *plain, obvious* and *gross* negligence, by not making use of facts within his knowledge, so as to give the mortgagor the *full benefit* that the mortgagee in possession of the estate of the mortgagor, ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and having notice that the estate was underlet, takes a new tenant, another person offering more. * * * I agree to the principle that has been stated by the Attorney-General, that it would be dangerous to say the mortgagee is not answerable except for *fraud*, and it would contradict many decrees, etc."

In Hilliard on Mortgages, pp. 418–9, it is said:

"If the mortgagee himself occupies he is accountable for the *utmost* value the land would have produced,

with ordinary care, exclusive of taxes and repairs; but if he enters into receipt of the rents, only after the rate of the rent reserved."

So, also, in Lord Trimleston *v.* Hamil, Ball & Betty's Ch. Rep., Vol. 1, p. 173, it is held:

"If the mortgagee enter into possession of the lands, he must account at their *utmost* value; he is always charged with the *utmost* value they are proved to be worth, etc."

Conclusive and overwhelming proof was adduced before the master that the prices charged for cotton used in the mill were $50,359.52 above the market price, and the prices realized for the sale of the product were $100,537.71 below the market price for the period of the accounting (*i. e.*, up to May 6, 1896).

Appellants have assigned exceptions to the report of the Master and errors in the Court of Appeals on these two items alone, as follows:

EXCEPTIONS TO REPORT OF SPECIAL MASTER.

"8. In holding and finding that the valuation of $33,737.28, credited by the Galeton cotton mills for goods on hand at the end of the period of accounting, was a correct valuation, and that no additional charge should be made against the Galeton cotton mills in favor of intervener on this account. Intervener claims and contends that the evidence shows clearly that the market value of the stock on hand at the end of the period of accounting, was as follows:

273,050 lbs. duck on hand April 30, 1896:		
Of which, in Boston, 117,832 lbs., 12½ cts. .	$14,729	00
Of which, in West Point, 155,218 lbs., 12½ cts.	19,402	25
Freight prepaid to Boston on former lot, .	707	00
Additional value on converted goods, . .	850	00
Goods at mill, unbaled, 1,691 lbs., at 12½ cts.	211	37
Cotton at mill, in process, 10,000 lbs., 12½ cts.	1,250	00
Other stock, waste, &c., 24,207 lbs., 2 cts. .	484	14
Total net value as per testimony, .	$37,633	76
Deduct valuation as per defendant's estimate,	33,737	28
Leaving a balance on this account of,	$3,896	48

which should have been charged in favor of intervener against the Galeton cotton mills in addition to the amount allowed of $33,737.28."

10. In holding and finding that no amount should be allowed in favor of the intervener against the Galeton cotton mills on account of "overcharge on cotton," bought and charged against the Galeton cotton mills by W. C. & L. Lanier. Intervener claims and contends that the prices paid for cotton by the Galeton cotton mills were largely in excess of the market prices of cotton in West Point, as shown by the evidence; and this excess, for the period of accounting, amounted to the sum of $50,359.52, which amount should have been found in favor of intervener against the Galeton cotton mills. Under this head intervener makes the following specific claims:

"(*a*) The overcharge on 610,507 lbs. of cotton, from January 9 to May 4, 1893, was one and four-tenths cents per pound, making $8,547.09, which should have been found in favor of intervener against the Galeton cotton mills; (*b*) the overcharge on 219,085 lbs. of cotton purchased during the month of June, 1893, was 1.476 cents per lb., or $3,233.69,

which should have been found in favor of intervener against the Galeton cotton mills, etc.

Intervener does not confine its claim to these two specifications, but claims and contends that the evidence shows an overcharge for the whole period of accounting, as shown by the difference in the market prices of cotton, and the prices at which it was charged against the Galeton cotton mills, of $50,359.52, as stated above.

10. (*a*) In holding and finding that the intervener should have shown to the master the amount and date of each purchase made by the Galeton cotton mills, and the market prices of cotton on those days, when it was a matter entirely and exclusively within the knowledge of the Galeton cotton mills and its officers and agents to show the amount and date of each of these purchases, and when intervener had shown the dates when they were charged, and had shown, by abundant evidence, the market prices on those days.

Intervener claims and contends that it was not incumbent on it to show the dates and amounts of cotton bought by the agents of the Galeton cotton mills for the mills, but that this duty rested upon the defendants, and that no proof having been offered by the defendants to show the dates and amounts of each of those purchases, the master should have taken the market prices at the dates when the cotton was charged on the cotton books of the Galeton cotton mills, and which were in evidence, and charge the difference between these prices and the market prices against the defendants, in favor of intervener, amounting to the said sum of $50,359.52."

11. In holding and finding that there was no liability on the part of the Galeton cotton mills to the intervener on account of its failure to sell the duck, manufactured by the mill, at the full market price of the same.

Intervener claims and contends that the product of the Galeton cotton mills was as good, or should have been as good, as the product of other competing mills, concerning which evidence was introduced before the master; and that the evidence shows, and the master should have found, that as much should have been realized per yard or per pound from the sale of the product of the Galeton cotton mills, as was realized, as shown by the evidence, for the product of the competing mills; or, in other words, the market prices for the ducks should have been realized, and that this was not done.

Intervener claims and contends that the evidence shows that the number of yards of the product sold, and the amount realized on same, as appearing on the account sales rendered by N. Boynton & Co., summarized, were as follows:

(*a.*) For 7 oz. and less than 8 oz., 1,944,638 yards, were returned at $127,497.76; whereas intervener claims and contends that there should have been realized and returned, according to the evidence, the sum of $145,445.98, showing a deficit of $17,951.22.

(*b.*) For 8 oz. and less than 9 oz., aggregating 4,510,140 yards, there is returned on account sales $286,195.04; whereas, intervener claims and contends, according to the evidence, there should have been realized and returned the sum of $389,495.51, showing a deficit of $53,300.47.

(*c.*) For 9 oz. and less than 11 oz., aggregating 2,245,301 yards, there is returned as per account sales, $197,731.71; whereas, intervener claims and contends, under the evidence, there should have been realized and returned $221,121.25, showing a deficit of $25,389.54.

In other words, to sum up for the 8,700,079 yards of product, so reported and sold, and returned, as per account sales, at $611,424.51, intervener claims and contends, under

the evidence, that the Galeton cotton mills, or the agents representing same, should have realized and returned the sum of $708,065.74; thus showing a deficit or undervaluation to be accounted for, of the sum of $96,641.23.

Intervener claims and contends that there should have been a finding in favor of intervener against the Galeton cotton mills for this difference between the amount returned by N. Boynton & Co., and the true value of the same, as shown by the evidence, to wit: the sum of $96,641.23.

The foregoing does not include the $3,896.48, deficit in valuation as to the stock on hand unsold, as already shown, the two together aggregating, as the amount of total deficit and undervaluation, the sum of $100,537.71.

Assignment of Errors.

"XI. The court erred in overruling exception No. 8 to the report of the special master:

"The master was in error, in finding and holding that the valuation of $33,737.28, credited by the Galeton cotton mills for the goods on hand at the end of the period of accounting, was correct valuation, and that no additional charge should be made against the Galeton cotton mills, in favor of appellant, on this account.

Appellant claims and contends, that the evidence shows clearly that the market value of the goods on hand, at the end of the period of accounting, was as follows:

On hand, April 30, 1896, cotton duck, 273,050 lbs.:

Of which, in Boston (freight prepaid), 117,832 lbs., 12½,	$14,729 00
Of which, in West Point, Ga., 155,219 lbs., 12½,	19,402 25
Freight prepaid to Boston, on former lot,	707 00
Additional value of converted goods,	850 00
Goods at mill, unbaled, 1,691 lbs., 12½,	211 37
Cotton at mill, in process, 10,000 lbs., 12½,	1,250 00
Other stock (cotton) waste, etc., 24,207 lbs., 2 cts.	484 14
Total net value, as per testimony,	$37,633 76
Deduct valuation, as per Lanier's estimate,	33,737 28
Leaving a net balance or deficit, on this account of	$3,896 48

which should have been charged in favor of appellant against the Galeton cotton mills, in addition to the amount allowed of, to wit, $33,737.28.

"XII. The court erred in overruling exception No. 10 to the report of the special master:

"The master was in error, in holding and finding that no amount should be allowed in favor of appellant, The Huguley Manufacturing Company, against the Galeton cotton mills, on account of "overcharge on cotton," bought and charged against the Galeton cotton mills by W. C. & L. Lanier. Appellant claiming and contending that the special master should have allowed, on this account, the sum of $50,359.52.

"XIII. The court erred in overruling exception No. 10 (*a*), to the report of the special master:

"The master was in error in holding and finding that appellant should have shown the amount and date of each purchase made by the Galeton cotton mills, and the market

prices of cotton on those days, when it was a matter entirely and exclusively within the knowledge of the Galeton cotton mills and of its officers and agents to show the amount and date of each of these purchases; and when appellant had shown the dates when they were charged, and had shown, by abundant evidence, the market prices on those days.

"XIV. The court erred in overruling exception No. 11 to the report of the special master:

"The master was in error, in holding and finding that there was no liability on the part of the Galeton cotton mills to The Huguley Manufacturing Company, appellant, on account of its failure to sell the duck manufactured by the mill at the full "market price" of the same. The evidence showing, as appellants then contended and now contend, that the cotton duck was sold at an amount less than its market value, in a large sum, to wit: $96,641.23.

"XV. The court erred in overruling the 14th ground of exception to the report of the special master:

"Appellants then contended and now contend, that the special master erred in admitting and using, as original evidence, the "account of sales" made by N. Boynton & Co., to the Galeton cotton mills, and in using the same as being a correct report of sales, made by N. Boynton & Co., of the product of the mill, the testimony not having been sufficient, as appellant contended and now contends, to show that these accounts of sales were correct, or that they showed correctly the receipts and disbursements made by N. Boynton & Co. on account of the sale of the product of the mills during the period of accounting.

"Counsel for appellant, The Huguley Manufacturing Company, did not object to these accounts of sales going in evidence as showing, in connection with the testimony of L.

Lanier, the amounts of money actually paid by N. Boynton & Co. to the Galeton cotton mills, but did object to their being used by the master, as correctly showing the amounts actually received for the mill products by N. Boynton & Co., there having been no sufficient nor independent evidence, as counsel for appellant contended and now contends, that they correctly represented the actual and proper receipts and disbursements on that account."

All of this testimony was ignored by the master on the ground that there had been no "wilful default," or, as he defined it, no "negligence so gross as to amount to wilful default."

XXII.

We shall call the attention of your Honors to one more gross error on this record which involves a large sum of money. The cotton book of the Galeton Mills showed that there had been bought and paid for 5,408,341 pounds of cotton. They further showed that 5,283,028 pounds of this cotton had been opened and consumed, leaving unaccounted for 125,313 pounds, which, at 8¼ cents, was worth $10,338.32.

The master disposed of this claim as follows (Part III, p. 33):

"It was further claimed by the movant that a large amount of cotton which should have been accounted for was not accounted for. It was sought to show this by a comparison of the total amount of cotton bought for the mill with the amount which the books show had been opened for the purpose of being manufactured. The evidence shows, however, that the Galeton Cotton Mills at times sold *some of the cotton on hand*, which *presumably* was not needed at the time, and that the *proceeds of these sales have been credited on the treasurer's accounts.* While

this claim does not seem to have been insisted on, it is enough to say that the evidence does not authorize any finding against the Galeton Cotton Mills for any such shortage."

Having charged this cotton against the mill, it was the duty of the accountants to show that every pound of it had been used or otherwise accounted for—not to account for *some of it*, but all of it. There is *only one* credit for cotton on the statement of the books produced by Lanier, and that is charged as "error in the price of cotton," and amounts to *only* $2,509.24. What the amount of these pretended credits were the master does not find. The only satisfactory finding he could make was that these credits covered the 125,313 pounds of cotton (over two hundred and fifty bales) shown by the books to be short. In this respect his report is vicious on its face.

His error in this matter was made one of the exceptions to his report (Part III, p. 41). The lower court ignored that exception. See opinion of Judge Newman on exceptions (Part III, pp. 40–53). It was specially assigned as error in the Circuit Court of Appeals (Part III, pp. 81–2, Assignment No. X). It was equally ignored in that court.

XXIII.

The deduction by the master of $4,654.60, *with* $469.72 *of interest thereon, from the aggregate allowed petitioners* ($44,367.66), *as a net "loss shown by books" of Galeton Cotton Mills during their operation of petitioners' property for three and two-thirds years, was absolutely without warrant of law or fact to support it. This error was specially assigned as one of the exceptions to the master's report in the lower court, but the exception was overruled without consideration thereof by the court. It was again specially assigned as error in the Circuit Court of Appeals and was there again ignored by the court, which amounted to a denial of justice by said court.*

The above proposition proves itself when it is remembered: First, that the books of the Galeton Mills were not in evidence; second, that the testimony of Lanier as to what the books not in evidence showed on this point, was based on a statement made up from these *excluded* books, not by himself, but by *somebody else;* third, that respondents could not be made to pay a sum claimed to have been lost by the mortgagees in the operation of the mill.

An inspection of the opinion of the Circuit Court shows that the exception on this point to the master's report was ignored. The Circuit Court of Appeals did likewise.

XXIV.

The record on its face shows that the cost of this property was $350,000.00, *its insurable value* $250,000.00, *and net earnings of the mill, covering a period of ten years immediately preceding its surrender to incumbents had, under the Huguley management, earned net profits of over* $40,000.00 *per annum, average, and for the period of accounting taken up to May* 6, 1896, "*should have earned,*" *according to the evidence adduced by numerous expert witnesses for the Huguley Manufacturing Company, the sum of* $228,000.00.

In support of the foregoing statement, see testimony of Wm. T. Huguley, and exhibits attached ("B" and "C,") Part II, pp. 138–9, 150–2 and 178–180. See, also, Admission of L. Lanier, under his statement (Exhibit "C,") Part II, p. 180.

And as to insurance and insurable value, see Testimony and Exhibits of M. B. Torbett, insurance expert and agent, Part I, p. 44, and Part II, p. 178.

XXV.

Summary.

We respectfully urge upon your Honors that this is a case deserving the weightiest consideration of this Honorable Court. The question of jurisdiction of the United States Circuit Court for the Northern District of Georgia to interfere with the State Chancery Court, whose jurisdiction had first attached and which was still holding, through its receiver, the trust property for the express purpose of meeting the interest coupons, and the further question as to its jurisdiction thus assumed over either parties or subject-matter (the *res* lying wholly in Alabama), and there being both a misjoinder and non-joinder of *indispensable* parties, and the refusal of the Circuit Court of Appeals to apply its *own* jurisprudence in the matter of the rents and revenues of the property in the long interval between confirmation and compliance, and the gross and material errors and inequities committed in the Circuit Court against petitioners, all left untouched, undiscussed and unredressed in the Circuit Court of Appeals, appeal to this court for the exercise of its supervisory jurisdiction.

Respectfully submitted,

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